IN THE

Supreme Court of the United States

October Term 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The petitioner Allen F. Breed, Director of the California Youth Authority, respectfully prays that a writ of certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 15, 1974.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to this petition. The opinion rendered by the United States District Court for the Central District of California is reported as *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972). The prior opinion of the California Court of Appeal disposing of respondent Jones' identical claim on state habeas corpus is reported as *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971), *hrg. denied* by California Supreme Court on August 4, 1971.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 15, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Was respondent Gary Steven Jones placed twice in jeopardy when the California juvenile court, after a finding of delinquency and upon determining that this minor was unfit for treatment as a juvenile, waived jurisdiction and directed the district attorney to file criminal charges in adult court?

Statutory Provisions Involved

The four provisions of the California Juvenile Court Law pertinent to this case are set forth verbatim as footnotes in the Statement of the Case which follows.

Statement of the Case

On February 9, 1971, a petition was filed in the Juvenile Court of Los Angeles County Superior Court alleging that respondent Gary Steven Jones was a person described by section 602 of the Welfare and Institutions Code,[1] in that he had committed an act which,

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[1]Unless otherwise indicated, all further references to California statutes will be to the California Welfare and Institutions Code. As of the date of filing of the petition in this case, section 602 provided:

> "Any *person* under the age of *21* years *who* violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." (Emphasis added.)

An amendment in 1971 lowered the jurisdiction age from 21 to 18. A 1972 amendment added "who is" after "person" and substituted "when he" for "who" before "violates."

if committed by an adult, would constitute a violation of California Penal Code section 211 (robbery). A detention hearing was held, and respondent was detained pending a hearing on the petition. [*See* Exhs. D and E to Dist. Ct. Petn., Record, pp. 19-20.]

On March 1, 1971, a "jurisdictional hearing" was held pursuant to section 701.[2] At the conclusion of this hearing, the juvenile court found that the allegations of the petition were true and that respondent was a person described by section 602. The proceedings

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[2]Section 701 provides:

> "At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, *proof beyond a reasonable doubt* supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made." (Emphasis added).

A 1971 amendment effective subsequent to respondent's jurisdictional hearing, substituted "proof beyond a reasonable doubt" as above for "a preponderance of evidence." Respondent Jones, however, has made no claim in the courts below that the standard of proof failed to satisfy due process under *In re Winship*, 397 U.S. 358 (1972).

were continued for a dispositional hearing pursuant to section 702.[3] [Record, p. 21.]

After a hearing held on March 15 and 22, 1971, the juvenile court found, pursuant to section 707,[4] that

[3]Section 702 provides:

"After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

This section has not been amended since the date of respondent's hearing.

[4]Section 707 provides today, as it provided at the time of respondent's hearing, as follows:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

respondent was not a fit subject for treatment as a juvenile and ordered that respondent be turned over to the sheriff and district attorney for prosecution as an adult. [Exh. F to Dist. Ct. Petn., Record, p. 38.] The juvenile court based its finding of unfitness on the fact that respondent had been involved in no fewer than three armed robberies. [*Id.*] The matter was set over one month for a nonappearance report as to the progress of the adult action. [*Id.*]

On April 1, 1971, the juvenile court denied a petition for state writ of habeas corpus filed on behalf of this respondent. This petition raised the same double jeopardy issue raised in respondent's petition for writ of habeas corpus in federal district court. [Exhs. G and H to Dist. Ct. Petn., Record, pp. 43-65.] Thereafter respondent sought habeas corpus relief in the California Court of Appeal, Second Appellate District, Division Four. Although that court initially stayed the

pending criminal prosecution of respondent, it ultimately rejected his double jeopardy claim in a published opinion. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971). On August 4, 1971, the California Supreme Court denied this respondent's petition for hearing with respect to the Court of Appeal decision. [Exh. I to Dist. Ct. Petn., Record, p. 66.]

Subsequently respondent was held to answer after a preliminary hearing on the robbery charge. Thereafter an information charging one count of robbery in violation of California Penal Code section 211 was filed in the California superior court. Respondent Gary Steven Jones pleaded not guilty and submitted his case to the court, without a jury, on the transcript of the preliminary hearing. The court found respondent guilty as charged and ordered him committed to the California Youth Authority where he is currently in constructive custody on parole. [See Exhs. J-N to Dist. Ct. Petn., Record, pp. 67-84.] No appeal was taken from that judgment of conviction.

On December 10, 1971, respondent Gary Steven Jones, through his mother as guardian *ad litem*, filed the instant petition for writ of habeas corpus in the District Court. [Record, p. 2.] After receiving a response on behalf of the California Youth Authority and after hearing argument from both parties, the District Court denied the petition for writ of habeas corpus in an order filed May 5, 1972. *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972).

Respondent filed a timely notice of appeal. [Record, p. 157.] On June 21, 1972, the District Court denied respondent's application for a certificate of probable cause.

On August 31, 1972, Chief Judge Chambers of the Ninth Circuit granted respondent's application for a certificate of probable cause and his motion to appeal *in forma pauperis*.

On May 15, 1974, the Ninth Circuit reversed the judgment of the District Court "with directions for the District Court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition."

On June 18, 1974, Judge Wallace of the Ninth Circuit granted a stay of the mandate of that court under Rule 41(a) of the Federal Rules of Appellate Procedure pending the filing, consideration and disposition by this Court of the instant petition for writ of certiorari, provided such petition was filed in the Clerk's Office of this Court on or before July 5, 1974. This petition has been filed prior to that date. The stay order further provides that, in the event the petition for writ of certiorari is granted, this stay is to continue pending the final disposition of the case by this Court.

In this case, the jurisdiction of the district court was invoked pursuant to the federal habeas corpus statutes, 28 U.S.C. §§ 2241 and 2254. The double jeopardy issue presented by this petition was the only issue raised and considered by the district court and the Court of Appeals for the Ninth Circuit.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

This Case Presents a Novel and Important Question of Whether Double Jeopardy Bars the Adult Trial of a Delinquent Juvenile Found Not to Be Amenable to Treatment Through the Facilities of the Juvenile Court

In this case, after a finding of delinquency at a jurisdictional hearing, the California juvenile court found respondent Jones unfit for treatment as a juvenile because he had committed three armed robberies. Thereafter respondent Jones was convicted of armed robbery in adult criminal proceedings.

On habeas corpus, the California courts and the federal district court found no violation of the prohibition against double jeopardy because no new jeopardy was involved when respondent stood trial as an adult. The Court of Appeals for the Ninth Circuit reversed the judgment of the district court and ordered the issuance of a writ of habeas corpus. The Ninth Circuit held that once jeopardy had attached at the adjudicatory or jurisdictional hearing in juvenile court, the minor could not be retried as an adult or as a juvenile absent some exception to the Fifth Amendment guarantee against double jeopardy made applicable to the States through the due process clause of the Fourteenth Amendment. *See Benton v. Maryland,* 395 U.S. 784 (1969). Petitioner submits that this holding presents an important constitutional issue which this Court should grant certiorari to decide.

At least 44 American jurisdictions have provisions in their juvenile court statutes which permit waiver of jurisdiction over certain juveniles found unfit for treat-

ment in the facilities available to the juvenile court. *See* Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 Stan. L. Rev. 266, 297, n.128 (1972). Of these jurisdictions, 33 states either make no mention of when transfer to the criminal courts can occur or expressly permit transfer after an adjudication of delinquency has begun. (*Id.* at 299-300 nn. 134-37.) Six states, including the populous states of California and Pennsylvania, permit the juvenile court to waive jurisdiction after a finding of delinquency.[5] (*Id.* at 300 n. 136.) Only 11 jurisdictions provide that when a waiver hearing is held, it must occur prior to a hearing on the merits of the delinquency petition.[6] (*Id.* at 299 n. 134.)

In addition to the large number of jurisdictions which will be affected if the Ninth Circuit's application of the double jeopardy clause to transfer proceedings, this Court must also consider the retroactive nature of such a double jeopardy rule in appraising the importance of the question raised by this petition. In *Ashe v. Swenson,* 397 U.S. 436, 438, n.1 (1970), this Court stated that *Benton v. Maryland, supra,* was retroactive in its application of double jeopardy to the states. Retroactive application of the Ninth Circuit's decision to California alone would result in the release

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[5]Conceptually, under the double jeopardy clause, it makes no difference whether the transfer takes place before or after the finding of delinquency. Assuming that jeopardy attaches when the first witness is sworn at a combined adjudicatory and transfer hearing, a new trial in adult court would be a second jeopardy unless one concludes that no new jeopardy arises or that the transfer is an exception to the double jeopardy prohibition.

[6]Obviously a decision to waive jurisdiction made prior to an adjudicatory hearing would not involve double jeopardy because the transfer hearing would then be akin to a preliminary hearing. In *Collins v. Loisel,* 262 U.S. 426 (1923), this Court held that jeopardy does not attach at a preliminary hearing.

of a large number of dangerous felons. Taking the period from 1969 through 1971 alone, it is readily apparent from the following table that a substantial number of prisoners may be eligible for outright release:[7]

PERSONS UNDER THE AGE OF 21 COMMITTED TO CALIFORNIA PRISONS DURING THE YEARS 1969-1971

Offense	Age at Date of Commitment					
	15	16	17	18	19	20
First degree murder	0	0	4	19	19	20
Second degree murder	0	0	4	9	15	24
Manslaughter	0	0	0	2	12	17
First degree robbery	0	0	1	25	87	175
Second degree robbery	0	0	0	5	16	51
Assault with a deadly weapon	0	0	2	2	15	31
Assault on peace officer	0	0	0	0	7	10
Forcible rape	0	0	1	6	14	23
First degree burglary	0	0	0	2	7	18
Second degree burglary	1	0	0	6	28	55
Grand theft	0	0	0	0	4	19
Receiving stolen property	0	0	0	1	5	15
Auto theft	0	0	0	2	15	19
Sale of narcotics	0	0	0	0	4	10
Sale of dangerous drugs	0	0	0	1	6	20
Escape	0	0	0	1	8	30
Weapons Laws	0	0	0	1	1	6
Kidnapping	0	0	1	2	7	5
Arson	0	0	0	0	1	2
All other felonies	0	0	0	8	32	76
TOTAL	1	0	13	92	303	626
				GRAND TOTAL:		1035

[7]These figures have been complied by the Bureau of Criminal Statistics of the California Department of Justice. Although no figures are presently available as to how many of these persons are still in prison or on parole, one would expect a high percentage of these persons still to be in custody because most of the crimes enumerated carry lengthy maximum sentences. For example, the crimes of murder, robbery, and assault with a deadly weapon are punishable by a maximum of life imprisonment in California. With respect to these figures, it is presumed that all of these juveniles transferred to adult court with a fitness hearing which preceded an adjudicatory hearing on the delinquency petition filed in juvenile court. California law did not provide for such a preliminary fitness hearing at that time.

In view of the probable impact of the Ninth Circuit rule, it is important that this Court consider whether double jeopardy must operate to bar the adult trial of a juvenile who is found unfit for treatment as a juvenile at or after a hearing on the issue of delinquency. This Court has stated that the Fifth Amendment guarantee against double jeopardy furthers three separate constitutional policies: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The first and third of these policies are inapplicable here because neither an acquittal nor multiple punishment for the same offense is involved. If any of these policies is applicable to the transfer situation, it would be the second one which protects against a second prosecution for the same offense after conviction. In reality, however, this second policy of double jeopardy appears to be just an aspect of the protection against multiple punishment: a second prosecution is barred after one conviction because it creates the risk of a second sentence for the same offense. When a juvenile court waives jurisdiction and orders a minor prosecuted as an adult, there is no risk of a second "sentence" for the same offense. Although the finding of delinquency in juvenile court may be analogized to a criminal conviction for some purposes, all of the proceedings—both juvenile and adult—can only result in a single disposition when there is a waiver of juvenile court jurisdiction. That disposition is a single criminal sentence for a single criminal offense.

The California courts and the federal district court found that no new jeopardy was created by the transfer of respondent Jones from juvenile court to adult court. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185 (1971); *Jones v. Breed*, 343 F. Supp. 690, 692 (C.D. Cal. 1972). *See also Bryan v. Superior Court*, 7 Cal. 3d 575, 580-84, 102 Cal. Rptr. 831, 498 P.2d 1079 (1972). This Court has recognized that "a concept of continuing jeopardy . . . has application where criminal proceedings against an accused have not run their full course." *Price v. Georgia*, 398 U.S. 323, 326 (1970). Although the court below would narrowly confine that concept to retrials which follow appellate reversals of criminal convictions, this Court has never intimated that continuing jeopardy is limited to that context.

It should be observed that juvenile court transfer proceedings do not permit the State ". . . to make repeated attempts to convict an individual for an alleged offense," a practice which this Court disapproved in *Green v. United States*, 355 U.S. 184, 187-88 (1957). The apparent purpose of the transfer procedures enacted in California and other jurisdictions is to see that the juvenile is accorded the full panoply of criminal trial rights before he may be sentenced to state prison. Those rights are not yet fully applicable to juvenile delinquency proceedings. As Mr. Justice Blackmun has written in *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971), "This Court, however, has not said that *all* rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceedings." (Emphasis in original.) The further equation of juvenile and adult court proceedings may ultimately lead some states to adopt criminal sentencing as one of the dispositional alternatives available to the juvenile court judge.

In its opinion, the Ninth Circuit asserts that "applying double jeopardy protection to juvenile proceedings will not impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth." (Slip Opinion, p. 7.) In reality, it further engrafts the criminal trial model onto the specialized structure of the juvenile court system. To avoid the bar of double jeopardy when seeking to remand a juvenile for trial as an adult, states such as California must adopt a preliminary hearing procedure in juvenile court to determine at the outset whether the minor is amenable to treatment as a juvenile or whether he should be tried as an adult. Such a procedure is reminiscent of the command of the Red Queen in Lewis Carroll's *Alice in Wonderland:* "Sentence first—verdict afterward." A preliminary fitness hearing would require the juvenile court judge to focus on disposition considerations before there has been an adjudicatory hearing on jurisdiction ("guilt"). The California Supreme Court has pointed out the basic unfairness of this approach in holding that the juvenile court commits reversible error by reviewing the probation officer's social study report on disposition before the determination of the issue of jurisdiction. The Court stated:

> "The history of [California] Welfare and Institutions Code sections 701, 702, and 706 clearly indicates that the Legislature intended to create a bifurcated juvenile court procedure in which the court would first determine whether the facts of

the case would support the jurisdiction of the court in declaring a wardship and *thereafter* would consider the social study report at a hearing on the appropriate disposition of the ward. This procedure affords a necessary protection against the premature resolution of the jurisdictional issue on the basis of legally incompetent material in the social report." *In re Gladys R.*, 1 Cal. 3d 855, 859-60, 83 Cal. Rptr. 671, 674-75, 464 P.2d 127, 130-31 (1970) (brackets added; footnotes omitted).

The purpose of requiring separate considerations of wardship and of disposition was to prevent the court from being affected, at the first stage, by evidence of the minor's character not relevant to determination of his guilt. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 708, 95 Cal. Rptr. 185, 188 (1971).

It thus becomes evident that the Ninth Circuit's decision in this case does not require California to add a just minor additional step to its juvenile court procedures. The preliminary fitness or waiver hearing mandated by the Ninth Circuit must be a costly and duplicative full-blown trial bearing no resemblance to the preliminary hearings held in the criminal courts. Under California law, the nature of the crime allegedly committed, the circumstances and details surrounding its commission, and the minor's degree of sophistication in relation to criminal activities are factors which may be considered by the juvenile court in the exercise of its discretion in certifying a minor to the superior court as not amenable to treatment as a juvenile. *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 715-16, 91 Cal. Rptr. 600, 604, 478 P. 2d 32, 36 (1970). In order to preclude manifest unfairness to the juvenile facing transfer, the offense alleged in the juvenile court petition will need to be proved at the waiver hearing by some quantum of proof beyond the submission of a mere *prima facie* case. Otherwise, a child of tender years may have to stand trial in adult court because of a presumption of guilt based on a limited factual hearing. In addition, the judge who presides at the fitness hearing must be disqualified from sitting at the subsequent jurisdictional hearing if the minor is found to be amenable to treatment as a juvenile, this requirement because of the potential of prejudice at the adjudicatory hearing from this judge's having examined the materials on the minor's prior criminal history in the probation department's social study. Thus, in order to satisfy the Ninth Circuit's view of the proper interpretation of the double jeopardy clause, the juvenile courts must conduct two full trials presided over by two different judges in every case where there is a question as to the minor's amenability to treatment in the facilities available to the juvenile court.

Petitioner further submits that the Ninth Circuit decision does reflect full appreciation of the purpose served by transfer proceedings when it asserts that "Appying double jeopardy protection to juvenile proceedings will not impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth." (Slip Opinion, p. 7.) Transfer provisions, such as California Welfare and Institutions Code section 707, permit the juvenile courts to screen out the hardened juvenile offender from those minors who show a better prospect for rehabilitation. As explained by one writer:

> "At some point during the adjudication of a delinquency case it may become apparent to the

juvenile court that the minor is unlikely to benefit from the rehabilitative resources available to the court. The minor may have demonstrated by his past behavior, for example, that rehabilitation is improbable and that more severe punishment is required. He may have proven himself a threat to the proper functioning of juvenile institutions during a prior commitment, thereby requiring placement elsewhere; he may be so old that the juvenile court cannot retain jurisdiction over him for a period long enough to rehabilitate him or to punish him fully for his offense. The court may send the juvenile to the criminal court for adjudication as an adult for any of these penological reasons. . . ." Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 Stan. L. Rev. 874, 877 (1972) (footnote omitted).

By requiring a final determination of fitness prior to the adjudicatory hearing, the Ninth Circuit rule is likely to create two pernicious effects. In close cases the juvenile court judge may opt for an adult trial rather than run the risk that a hardened offender not amenable to treatment must be retained in a juvenile facility where his attitude and example may adversely affect the rehabilitation of other youths. In other cases, the true character of the juvenile may not be apparent at the outset of proceedings. In these cases, the more serious offender must be kept in one of the treatment facilities available to the juvenile court where he may be able to corrupt other youths and disrupt efforts directed toward the rehabilitation of others.

A third additional effect of the Ninth Circuit rule will be in the windfall bestowed upon a large number

of dangerous felons who were certified for trial as adults at a time when juvenile court proceedings were thought to be "civil proceedings" and who were given the benefit of an adult trial, not as a repeated attempt to obtain a conviction, but in order to give them the greater protections accorded in adult criminal proceedings. In *McKeiver v. Pennsylvania, supra,* 403 U.S. at 551, this Court observed:

> "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day but for the moment we are disinclined to give impetus to it."

The application of double jeopardy to bar adult trials for minors over whom the juvenile court has waived jurisdiction clearly decreases its flexibility. If it is unable to fulfill the rehabilitative ideal because of an inability to remove disruptive or depraved individuals from its programs, a promising experiment may come to an end. It would indeed be anomalous if the application of double jeopardy to waiver proceedings were to occasion this result. At common law, there were no juvenile courts, and hence there was no analogue to the *sui generis* proceedings here involved. Therefore, it cannot be said that the framers of the Bill of Rights ever intended double jeopardy to apply to this unique feature of the juvenile court structure.

While the Ninth Circuit notes that there is authority indicating that the preferred practice is to hold a fitness hearing prior to any determination of delinquency (Slip Opinion, p. 9), this preference appears to be based on the cautious assumption that such a practice

is necessary to avoid potential application of double jeopardy to transfers of juveniles to adult courts for trial. The fact remains, however, that 33 states permit transfer after an adjudication of delinquency has begun. Although the widespread extent of a practice is not conclusive as whether that practice accords with due process, this Court has held that it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Leland v. Oregon,* 343 U.S. 790, 798 (1952). Petitioner submits that the extent of the practice involved here and its importance to the proper functioning of the Nation's juvenile courts make this case appropriate for certiorari.

II

This Court Should Grant Certiorari to Resolve a Conflict Between the Circuits

In holding that double jeopardy barred respondent's trial as an adult, the Ninth Circuit rejected the clear precedent of a prior District of Columbia Circuit decision to the contrary. In *United States v. Dickerson,* 271 F. 2d 487, 491 (D.C. Cir. 1959), the Court of Appeal held that the "full investigation" required by the District of Columbia juvenile court laws prior to a waiver of jurisdiction contemplated at the very least an informal hearing into the allegations of the petition. The court concluded:

> ". . . it was not improper for the Juvenile Court to conduct a hearing before determining whether or not to waive jurisdiction. To hold that jeopardy attached at that point would preclude the full and informal investigation in the interests of the minor and the community which Congress thought necessary to achieve the salutary remedial purposes of a juvenile court system." (*Id.* at 491-82.)

The *Dickerson* case is indistinguishable from the instant case. In *Dickerson,* the juvenile admitted the conduct alleged in the delinquency petition, and the juvenile court found him to be within its jurisdiction of a delinquent child. Thereafter the juvenile court waived jurisdiction to the district court for trial. (*Id.* at 489-90.) The minor involved was indicted for robbery, but the district court dismissed indictment on the ground that double jeopardy had attached in the juvenile court proceedings. *United States v. Dickerson,* 168 F. Supp. 899, 900-03 (D.D.C., 1958). From these facts, it is clear that the Court of Appeals decision in *Dickerson* is in square conflict with the Ninth Circuit's decision in this case. The opinion of the Ninth Circuit acknowledges the conflict by stating:

> "We recognize there is dicta to the contrary in *United States v. Dickerson,* 271 F.2d 487 (D.C. Cir. 1959), but that language has been so undercut by *Kent, Gault,* and *Winship,* that we are not persuaded that it is a correct statement of today's law." (Slip Opinion, p. 11.)

Of course, none of the decisions of this Court which purportedly undercut the holding of *Dickerson* hold that double jeopardy applies to juvenile court proceedings, much less to the waiver of jurisdiction involved here.

III

This Case Also Presents a Conflict Between the Ninth Circuit and the California Supreme Court on a Question of Federal Constitutional Law

Perhaps even more important than the conflict between the circuits as a factor which should motivate this Court to grant certiorari, is the direct conflict between the California Supreme Court and the Ninth Circuit on the question of whether double jeopardy bars an adult criminal trial where a waiver of jurisdiction occurs during or after a hearing on the merits of a juvenile delinquency petition. The California Supreme Court expressly approved the decision of the California Court of Appeal in this case, agreeing with the application of the concept of continuing jeopardy and rejecting the view that a transfer of the minor is constitutionally forbidden once legal jeopardy has attached at the jurisdictional stage of the juvenile court proceedings. *Bryan v. Superior Court,* 7 Cal. 3d 575, 580-83, 102 Cal. Rptr. 831, 834-36, 498 P.2d 1079, 1082-84 (1972), *cert. denied,* 410 U.S. 944 (1973). In this case, the Ninth Circuit has taken the opposite view.

While the California Supreme Court has indicated that the juvenile courts of this state may conduct fitness hearings prior to hearing the merits of a delinquency petition (*see Donald L. v. Superior Court,* 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853, 498 P. 2d 1098, 1101 (1972)), the *Bryan* decision, *supra,* makes

it clear that the failure to hold the fitness hearing before the jurisdictional hearing will not be reversible error. Moreover, it is well established in California jurisprudence that, although the California courts are bound by decisions of this Court interpreting the federal Constitution, they are not so bound by decisions of the lower federal courts even on federal questions. *See, e.g., People v. Bradley,* 1 Cal. 3d 80, 86, 81 Cal. Rptr. 457, 460, 460 P. 2d 129, 132 (1969).

Thus, the net result will be a substantial number of California criminal judgments which will be affirmed on appeal only to be set aside on federal habeas corpus under compulsion of the Ninth Circuit's decision in this case. Unless this Court grants certiorari, this Circuit may be treated to the spectacle of a federal-state conflict of massive proportions. The latest figures available indicate that the following numbers of juveniles were remanded for trials as adults during the period of 1968 through 1972: 1,018 in 1968; 797 in 1969; 914 in 1970; 894 in 1971; and 509 in 1972. Bureau of Criminal Statistics, Calif. Dept. of Justice, *Crime and Delinquency in California—1972,* p. 52, table 13. Petitioner submits that this Court should grant certiorari to forestall the deterioration of federal-state relations which might ensue if the California courts were ordered to set aside their judgments in all, or even most, of these cases.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Gary Stevens Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, *Petitioner-Appellant*, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, *Respondents-Appellees*. No. 72-2644.

[May 15, 1974].

Appeal from the United States District Court for the Central District of California.

Before: GOODWIN and WALLACE, Circuit Judges, and EAST,* District Judge

WALLACE, Circuit Judge:

Seventeen-year-old Jones was apprehended for robbery, detained and adjudicated a ward of the juvenile court. Subsequently, he was referred for trial as an adult and was convicted. Having exhausted his state remedies, he unsuccessfully applied to the district court for habeas corpus relief, claiming a violation of his Fifth Amendment right against double jeopardy. We reverse.

California does not challenge the use of habeas corpus as a proper remedy in this case, *see Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), or contend that Jones has not exhausted his state remedies. The sole question before us is whether jeopardy attached during

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*Honorable William G. East, Senior United States District Judge, Eugene, Oregon, sitting by designation.

the juvenile court proceedings to prevent Jones' trial as an adult.

The State of California filed a petition in the juvenile court alleging that Jones, a minor, had committed an act which, if committed by an adult, would be a violation of Cal. Penal Code § 211 (robbery). If the allegations in the petition were true, the juvenile court had jurisdiction pursuant to Cal. Welf. & Inst'ns Code § 602.[1] The juvenile court, following a preliminary hearing, ordered that Jones be detained pending a hearing on the delinquency petition.

Twenty days later, the juvenile court held the delinquency hearing[2] for the purpose of determining whether Jones had committed the crime alleged, whether the juvenile court had jurisdiction and whether Jones would be adjudged a ward of the court.[3] Thus, for the juvenile court to proceed, the state had to prove that Jones committed the robbery. With the exception of a right to a jury trial, the delinquency hearing is in the nature of a criminal trial. *See In re Winship*, 397

[1]Cal. Welf. & Inst'ns Code § 602 provides in part:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

[2]Cal. Welf. & Inst'ns Code § 701 provides in part:

> At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602. . . .

[3]See note 1, *supra*.

U.S. 358, 365-66 (1970); *In re Gault*, 387 U.S. 1, 49-51 (1967). Jones and two prosecution witnesses testified at the hearing. The juvenile court found that Jones had committed the robbery and that Jones was under the jurisdiction of the juvenile court and continued the proceedings to a later date at which time the court would determine the proper disposition of Jones.[4] At the subsequent hearing, the juvenile court judge announced he did not intend to proceed with Jones as a juvenile but intended to find him unamenable to the rehabilitative facilities of the juvenile court and to direct the District Attorney to prosecute Jones as an adult.[5] Upon an objection by Jones that he had

[4]Cal. Welf. & Inst'ns Code § 702 provides in part:

> After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Section 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance. . . .

[5]Cal. Welf. & Inst'ns Code § 707 provides in part:

> At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, . . . the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall di-

(This footnote is continued on next page)

assumed the hearing was to determine disposition to the appropriate juvenile facility, not to determine certification to the adult court for criminal prosecution, the court granted a one-week continuance. At the next hearing, Jones objected to the certification, contending, among other things, that he had already been adjudicated a person described in Cal. Welf. & Inst'ns Code § 602[6] by the juvenile court and, therefore, certification to be "tried" again would place him twice in jeopardy. The court rejected the argument and certified Jones to be tried as an adult.

Following an unsuccessful attempt to secure habeas corpus relief in the state courts, Jones was tried and found guilty of armed robbery and his double jeopardy argument was again rejected.

Undaunted, Jones filed a petition for habeas corpus in the district court, once more claiming double jeopardy. The district court judge denied the petition, holding that jeopardy does not attach in the juvenile proceedings and even if it had, no new jeopardy arose by the procedure of certifying Jones to be tried and ultimately convicted as an adult. *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972).

We must first resolve whether the protection of the Fifth Amendment "nor shall any person be subject for the same offense to be twice put in jeopardy of life

rect the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

[6]See note 1, *supra*.

or limb . . . ." applies to juvenile court proceedings.[7] Certainly the constitutional mandate makes no distinction between adults and juveniles. *See In re Gault*, 387 U.S. 1, 13 (1967). The district court found that the nature of the juvenile court proceeding is such that it should be treated differently from adult criminal proceedings and double jeopardy restrictions should not be applied.

The juvenile court system was conceived around the turn of the century with the emergence of the enlightened concept of separating erring children from hardened felons.[8] The primary objective of the new system was to take juvenile offenders out of adult courts and adult bastilles and provide them with a sound rehabilitation program.[9] The system was envisioned as civil in nature rather than criminal. Traditional adversarial fact-finding procedures were abandoned in favor of informal procedures that would allow the court to determine what was in the juvenile's best interest and how he could be retrained, while at a pliable age, to live

[7]The double jeopardy clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

[8]Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 Crime and Delin. 68, 69 (1972); Comment, *Constitutional Rights of Juveniles: Gault and Its Application*, 9 Wm. & Mary L. Rev. 492 (1967); Note, *Due Process and the Juvenile Offender: The Scope of In re Gault*, 14 How. L.J. 150, 151 (1968). For a very thorough history of the juvenile justice system in the United States from its meager beginning in the 1820's to the landmark enactment of the juvenile court in Illinois in 1899 (the forerunner of the modern movement), *see Fox, Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970), and Mennel, *supra*.

[9]Note, *supra* note 8, at 151; Comment, *supra* note 8, at 492.

lawfully in society.[10] The juvenile court judge, in his role as "father"[11] to the erring juvenile, was to protect his interest and welfare. Rules of evidence were abandoned and constitutional guarantees provided in adult proceedings were not afforded juveniles.[12]

Although the adoption of these informal methods was perhaps sound in principle, the complexities of our society and our overcrowded juvenile court facilities dictated some modification.[13] In *Kent v. United States*, 383 U.S. 541 (1966), the Court analyzed the procedure for referring a juvenile for trial as an adult. Recognizing the significant disparity of what could happen to the juvenile depending upon whether he was tried as a juvenile or as an adult, the Court was no longer willing to have the waiver of jurisdiction decision made without the due process requirements of a hearing, representation by counsel, a statement of reasons or considerations for any referral to the adult court and opportunity for the juvenile's counsel to review the child's social study records.

Kent was followed by *In re Gault*, 387 U.S. 1 (1967), in which the Court mandated due process protection at the delinquency hearing by requiring (1) that the juvenile be given adequate notice of the charges, (2) that he be given the right to counsel, (3) that he be allowed to assert the privilege against self-incrimination and (4) that he be given the right to confront and

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[10]Mennel, *supra* note 8, at 69; Note, *supra* note 8, at 151; Comment, *supra* note 8, at 492.

[11]Haviland, *Daddy Will Take Care of You: The Dichotomy of the Juvenile Court*, 17 Kan. L. Rev. 317, 322 (1969).

[12]*Id.*

[13]McKeiver v. Pennsylvania, 403 U.S. 528, 543-45 (1971); Comment, *supra* note 8, at 492; *see* Note, *supra* note 8, at 151.

cross-examine witnesses. More importantly, the *Gault* Court sounded a new approach to the juvenile system and rejected the theory that constitutional safeguards should be denied juveniles by the expedient of labeling the proceedings as civil when in fact they were criminal in nature. The Court reemphasized this requirement in *In re Winship*, 397 U.S. 358 (1970), holding that the charges against the juvenile must be proven at the delinquency hearing beyond a reasonable doubt. After *Winship*, if the state wished to limit constitutional rights, it inherited the burden of proving that criminal safeguards would be detrimental to particular aspects of the juvenile system.[14]

It was unclear, however, whether these constitutional safeguards[15] included the Fifth Amendment protection against double jeopardy.[16] The Supreme Court has held that not all common law protections available to adults are available to juveniles. The Constitution does not require the total emasculation of juven-

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[14]*The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 160 (1970).

[15]Following *Gault*, many commentators speculated on what additional constitutional safeguards would be available to juveniles. *See* Carver and White, *Constitutional Safeguards for the Juvenile Offender, Implications of Recent Supreme Court Decisions*, 14 Crime and Delin. 63 (1968); Gardner, *Gault And California*, 19 Hastings, L.J. 527 (1968); Comment, *Juvenile Court Procedures Beyond GAULT*, 32 Albany L. Rev. 126 (1967); Note, *Extending Constitutional Rights To Juveniles—Gault in Indiana*, 43 Ind. L.J. 661 (1968); Note, *The Constitution And Juvenile Delinquents*, 32 Mont. L. Rev. 307 (1971); Comment, *In Re Gault And The Persisting Questions Of Procedural Due Process And Legal Ethics In Juvenile Courts*, 47 Neb. L. Rev. 558 (1968).

[16]Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 Stan. L. Rev. 874 (1972); Note, *Double Jeopardy and Due Process in the Juvenile Courts*, 29 U. Pitt. L. Rev. 756 (1968).

ile court procedures. As Justice Blackmun stated in *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971):

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

The basic approaches of the juvenile and adult adjudicative processes dictate that the systems not operate exactly alike. In *McKeiver*, the Court rejected the contention that a juvenile court must provide a jury trial; Justice Blackmun stated:

> If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial.

403 U.S. at 550. But that case does not dictate the non-applicability of double jeopardy. Whether a jury is required deals with the method of juvenile adjudication; whether double jeopardy applies goes to the very core of basic application of rights and does not affect how the juvenile is tried. Its only effect on procedure pertains to whether the hearing to determine whether a minor is a fit subject for the juvenile program must be held before he is adjudicated a ward of the court. Applying double jeopardy protection to juvenile proceedings will not impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth. Indeed, basic constitutional guarantees such as that against double jeopardy are so fundamental to our notions of fairness that our refusal to find them applicable to the youth may do irreparable harm to or destroy their confidence in our judicial system. Ultimately, this may be more important than our recognition of the need for special and informal procedures to rehabilitate juveniles.

A youth is entitled to double jeopardy protection particularly when the state has elected to try him as an adult. We agree with the Fifth Circuit's statement in *Fain v. Duff*, 488 F.2d 218, 225 (5th Cir. 1973):

> Here we have a juvenile threatened with a criminal prosecution. By indicting him, the state has expressed a desire to treat him in all respects as an adult. Is there any question that since the state now proposes to subject him to the powers of the state as it would an adult, it must now accord him all the procedural rights than an adult has?

We hold that the Fifth Amendment guarantee of double jeopardy is fully applicable to juvenile court proceedings.

Having concluded that the protection against double jeopardy is among the safeguards available to a juvenile, we must decide whether jeopardy attaches during the delinquency hearing. When the juvenile court can, on the basis of the delinquency hearing, impose severe restrictions upon the juvenile's liberty, we believe jeopardy attaches. As the Fifth Circuit, when faced with a similar question in *Fain v. Duff*, 488 F.2d at 225, concluded:

> Although commitment to the Division of Youth Services may result in the juvenile being allowed to return to his home, it may also result in incarceration until age 21. Fain's commitment to the division resulted from his having been found

> delinquent. And his being found delinquent resulted from his having violated a criminal law of the State of Florida. F.S.A. §39.01(9). Thus, a violation of the criminal law may directly result in incarceration. This is a classic example of "jeopardy."

Several states have held that jeopardy attaches in the juvenile court proceeding.[17] The California Supreme Court in *Richard M. v. Superior Court*, 4 Cal. 3d 370, 482 P.2d 664 (1971), held that a second juvenile prosecution is barred where the identical delinquency petition has been dismissed in a prior juvenile court proceeding where, after a hearing on the merits, a termination similar to an acquittal has been ordered.

Although California concedes that jeopardy attaches when the juvenile is adjudicated a ward of the court, it argues that no *new* jeopardy attaches when the juvenile is referred to the adult court and subsequently convicted. It contends that the juvenile's prosecution in both the juvenile and adults courts is one continuous proceeding. To provide a legal theory for its position, California points to its own decisions contending that there is a "continuing jeopardy." *Bryan v. Superior Court*, 7 Cal.3d 575, 583, 498 P.2d 1079 (1972), *cert. denied*, 410 U.S. 944 (1973). That theory was applied by the California District Court of Appeal and by the United States District Court in this case.

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[17]*E.g., Arizona:* Anonymous v. Superior Court, 10 Ariz.App. 243, 457 P.2d 956 (1969); *Idaho:* State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972); *Iowa:* State v. Halverson, 192 N.W. 2d 765 (Iowa 1971); *Texas:* Collins v. State, 429 S.W.2d 650 (Tex. App. 1968).

In re Gary J., 17 Cal.App.3d 704 (1971); *Jones v. Breed*, 343 F.Supp. 690, 692 (C.D. Cal. 1972).

Jones argues, on the other hand, that if the juvenile court is to certify a child to the adult court free of jeopardy, it must do so at a fitness hearing held prior to any determination of delinquency. There is no doubt that this is the preferred practice. Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L. Q. 387, 397-98 (1961); *California Juvenile Court Deskbook*, § 10.4, at 148-50 (Cal. College of Trial Judges (1972)); *Model Rule for Juvenile Courts 9, National Council on Crime and Delinquency* (1969). In fact, the California Supreme Court has commended this procedure. *Donald L. v. Superior Court*, 7 Cal.3d 592, 598, 498 P.2d 1098, 1101 (1972).[18]

The question, however, is not whether it is preferable to have the fitness hearing first,[19] but whether the subsequent adult trial is a new jeopardy rather than a continuing jeopardy which both parties agree attaches at the juvenile court delinquency hearing. The theory of continuing jeopardy was implied in *United States v. Ball*, 163 U.S. 662 (1896), and enunciated by Justice Holmes in his dissent in *Kepner v. United States*, 195 U.S. 100, 134-35 (1904). In *Kepner* the Court held that to allow the prosecution to appeal from a judgment of acquittal would place a defendant in double jeopardy. Justice Holmes dissented, arguing that

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[18]The thrust of Jones' argument is that, in order to comport with the prohibition against double jeopardy, the juvenile court must waive jurisdiction in favor of the adult court prior to the delinquency hearing and not after it. Some states provide for this by statute. *E.g.*, Ga. Code Ann. § 24-A-2501; N.M. Stat. Ann. § 13-14-27.

[19]The fitness hearing procedure is described in Jimmy H. v. Superior Court, 3 Cal.3d 709, 478 P.2d 32 (1970).

"a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." The prohibition of double jeopardy. he argued, only forbids "a trial in a new and independent case where a man already [has] been tried once." 195 U.S. at 134.

The Court has never adopted Holmes' theory,[20] but it has adopted a form of continuing jeopardy under which a person may be retried on any charges of an indictment for which he has been convicted and for which he has, upon an appeal initiated by him, had that conviction reversed. *Green v. United States,* 355 U.S. 184 (1957). If he has been acquitted, either implicitly or expressly, of any charge, he cannot be retried on that charge. *Price v. Georgia,* 398 U.S. 323 (1970). Similarly, he may not be tried for a single offense growing out of a single occurrence, criminal episode or transaction by two courts created under the authority of one state. *Waller v. Florida,* 397 U.S. 387 (1970); *Ashe v. Swenson,* 397 U.S. 436 (1970).

The principles of continuing jeopardy, as adopted by the Supreme Court, do not support California's argument that the jeopardy that attaches at the juvenile adjudicatory hearing continues through the adult

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[20] [Justice Holmes] did dissent from the holding in *Kepner*—that the Government could not appeal an acquittal—on the ground that a new trial after an appeal by the Government was part of the continuing jeopardy rather than a second jeopardy. But that contention has been consistently rejected by this Court. Green v. United States, 355 U.S. 184, 196 (1957).

trial.[21] First, the trial in adult court does not follow as a result of an appeal taken by the minor from his juvenile court conviction, but is a retrial for the same offense initiated by the state. Continuing jeopardy allows retrial following an appeal initiated by the defendant claiming error in his first conviction. If the conviction is reversed, retrial must be in the same court as the first trial. It would be in violation of the principles enunciated in *Price v. Georgia* and *Green v. United States* to allow the state to initiate a retrial after it has already obtained a conviction in juvenile court. Second, transfer following the adjudicatory hearing would essentially allow the minor to be tried for one offense in two courts created by the same state in violation of the principles enunciated in *Waller v. Florida* and *Ashe v. Swenson.* The juvenile courts are a separate court system from the adult courts and once a minor has been placed in risk of conviction he cannot be retried. Although trial in both the juvenile and the adult court may not result in separate punishment, double jeopardy protects double risk of conviction, not

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[21] As one commentator recently asserted:

> Continuing jeopardy relies on the assumption that the several trials are all based on the same complaint. In the certification situation this underlying premise is lacking. When the juvenile court judge enters a finding of nonamenability, the juvenile petition is dismissed; subsequent criminal action is based on a new complaint alleging the same facts. Even under Holmes's formulation this would not be continuing jeopardy since each prosecution proceeds under the authority of a different complaint.

Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts,* 24 Stan. L. Rev. 874, 888 (1972) (footnotes omitted).

just double risk of punishment. *Price v. Georgia,* 398 U.S. at 331. Rather than supporting California's approach, the principles of continuing jeopardy dictate that once jeopardy has attached to a minor in a juvenile court delinquency hearing, he may not be placed in peril of conviction in an adult court for charges based on any occurrence, criminal episode or transaction used as the basis for the petition in the juvenile court.

The Fifth Circuit in *Fain v. Duff,* 488 F.2d 218 (5th Cir. 1973), reached this same conclusion. Fain was arrested for rape and adjudged a delinquent by a juvenile court. Subsequently, a grand jury indicted him for the same offense. Habeas corpus issued from the district court based upon former jeopardy and the circuit court affirmed. We detect no reason to distinguish *Fain* from our case and are disposed to adopt its reasoning. We recognize there is dicta to the contrary in *United States v. Dickerson,* 271 F.2d 487 (D.C. Cir. 1959), but that language has been so undercut by *Kent, Gault* and *Winship,* that we are not persuaded that it is a correct statement of today's law.

There are basic issues of fairness upon which we should comment. Nowhere in our criminal system do we allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged. The most heinous and despicable criminal is saved from such an invasion of his fundamental rights. Yet, if we adopt California's position, we approve having such a procedure applied to those of tender years. This offends our concepts of basic, even-handed fairness.

We hold that once jeopardy attaches at the adjudicatory or jurisdictional hearing in the juvenile court (here held pursuant to Cal. Welf. & Inst'ns Code § 602), the minor may not be retried as an adult or a juvenile absent some exception to the double jeopardy prohibition. There was none here. We cannot allow this fundamental constitutional right to be wrenched from the minor under the guise of providing a system for his protection.

We reverse with directions for the district court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition.

APPENDIX B.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, v. Allen F. Breed, Director of the California Youth Authority, Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. No. 71-2907-LTL.

343 F.Supp. 690 (C.D. Cal., May 5, 1972).

MEMORANDUM AND ORDER

LYDICK, District Judge.

This matter is before the Court on a Petition for Writ of Habeas Corpus filed on behalf of minor Gary Steven Jones, a prisoner of the State of California committed to the California Youth Authority after his conviction under California law of robbery in the first degree.

The Court has considered the arguments and has reviewed the Petition, the response, the reply and the authorities cited by both parties as well as the complete record of all state court proceedings.

The sole issue before this Court is whether Jones has been placed twice in jeopardy in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution by reason of his subjection to those procedures of the Welfare and Institutions Code of the State of California, known otherwise as the Juvenile Court Law, establishing a special treatment for suspected juvenile offenders.[1]

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[1]California Welfare and Institutions Code, Sections 602, 701, 702 and 707.

The question here presented has been previously considered at each stage of the proceedings before the involved state courts and duly submitted to the Court of Appeal, Second District, and Supreme Court of the State of California, on habeas corpus.[2]

Briefly stated, the facts are that on February 9, 1971 a petition was filed with the juvenile court in Los Angeles, alleging that Jones was a person described by Section 602 of the Welfare and Institutions Code in that he had committed an act which, if committed by an adult, would constitute a violation of Section 211 of the Penal Code of the State of California (robbery). After a detention hearing, the minor was detained pending a hearing on the petition. A second hearing, pursuant to Section 701 of the Welfare and Institutions Code, was held on March 1, 1971 and resulted in a finding that the allegations of the petition were true and that the minor was a person described by Section 602. The proceedings were continued for dispositional hearing pursuant to Section 702. At that hearing, the Court announced its intention to find, pursuant to Section 707, that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court and that the court intended under that section to dismiss the petition and direct that the minor be prosecuted as an adult in the Superior Court. After an adjournment, sought by the minor's counsel, such an order was made. Jones was thereafter prosecuted as an adult in the Superior Court and convicted as above noted.

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[2]In Re J., 17 Cal.App.3d 704, 95 Cal. Rptr. 185 (1971); Cert. denied by California Supreme Court August 4, 1971.

It is the second hearing before the juvenile court under Section 701 on which this Court has been asked by petitioner to focus its attention and to find that such hearing was tantamount to a criminal trial wherein jeopardy attached at its commencement thus foreclosing any later criminal prosecution.

Such finding cannot be made. That hearing was but one step in a comprehensive program developed by the State of California for the handling of delinquent youth. That program, representing the combined efforts of the California legislature and judiciary, is a thoughtful and in this Court's view entirely constitutional effort to strike a realistic balance between the public's right to order and its interest in the proper care and handling of juveniles.

The preliminary procedures of the California Juvenile Courts Law, civil rather than criminal in nature, provide to a minor accused of a crime a means to escape some of the consequences which would result to an adult offender if in the opinion of the juvenile court the minor is one who would benefit from its application. As applied by California courts, those procedures contain all the essential elements of due process and fundamental fairness required by the Federal Constitution as interpreted by the U.S. Supreme Court, in, among others, Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948), Kent v. U.S., 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).

Th distinctions between the preliminary procedures and hearings provided by California law for juveniles

and a criminal trial are many and apparent and the effort of petitioner to relate them is unconvincing. However, even assuming jeopardy attached during the preliminary juvenile proceedings, and further assuming all rights constitutionally assured to an adult accused of crime are to be enforced and made available to a juvenile[3] it is clear that no new jeopardy arose by the juvenile proceeding sending the case to the criminal court. Such transfer neither acquitted nor convicted and could not in any event represent a second trial for the same offense or more than a continuing jeopardy for a single offense.

While there is no doubt that certain formal and technical rules as to when jeopardy attaches or terminates may have their place and serve a valid function in adult criminal proceedings, to apply these same rigid and inflexible standards to a juvenile court could deprive if of its ability to function. In this regard, this Court is in full concurrence with the findings of the U.S. Supreme Court in its most recent examination of the juvenile courts:

> "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." McKeiver v. Pennsylvania, 403 U.S. 528, at 551, 91 S.Ct. 1876, at 1989 (1971).

The Petition for Writ of Habeas Corpus is denied.

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[3]But see McKeiver v. Pennsylvania, *supra*, at page 533, 91 S.Ct. 1976.

APPENDIX C.

[Crim. No. 19956, Second Dist., Div. Four. May 19, 1971.]

In re GARY J., a Minor, on Habeas Corpus.

KINGSLEY, J.—On February 9, 1971, a petition was filed in the Juvenile Court of Los Angeles County, alleging that the relator herein—Gary J.—was a person described by section 602 of the Welfare and Institutions Code,[1] in that he had committed an act which, if committed by an adult, would constitute a violation of section 211 of the Penal Code (robbery). After a detention hearing, the minor was detained pending a hearing on the petition. A "jurisdictional" hearing, pursuant to section 701,[2] was held on March 1, 1971, resulting in a finding that the allegations of the petition

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[1]Unless otherwise indicated, statutory references are to the Welfare and Institutions Code.

[2]Section 701 of the Welfare and Institutions Code reads as follows: "At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Sections 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made."

were true and that the minor was a person described by section 602. The proceedings were continued for a dispositional hearing, pursuant to section 702.[3] At that hearing, the court announced its intention to find, pursuant to section 707, that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, and that the court intended, under that section, to dismiss the petition and direct that the minor be prosecuted as an adult in the superior court. After an adjournment sought by the minor's counsel, such an order was made. The present proceeding is designed to test the validity of the order;[4] we conclude that it was validly made and not subject to attack herein.

---

[3]Section 702 of the Welfare and Institutions Code read as follows: "After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

[4]The contentions here made were seasonably raised in the juvenile court proceeding and by way of a petition for habeas corpus in the superior court.

I

It is not here contended that the order was not based on evidence sufficient to support the findings required by section 707. The contentions are:

(1) That, as a matter of statutory construction, the order under section 707 must be made during the pendency of the 701 hearing and that, the 701 hearing having terminated, statutory power to send the juvenile to superior court for a criminal trial had lapsed; and

(2) That, at whatever stage the statute permits an order such as the one herein involved to be made, constitutional rights affording protection against double jeopardy prevent such action at any time after the 701 hearing has begun.

II

(1) We conclude that the statutory scheme was followed in the case at bench. Section 707 reads as follows: "At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the

minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

Although sections 701 and 702 clearly contemplate that the determination of wardship, and the determination of treatment shall be separately considered; and, except in cases where the probation officer has anticipated the jurisdictional finding and prepared his social study in advance, that they will be made on different days, still the language of both sections speaks

of "the" hearing and, in section 702, of a continuance of "the" hearing. We conclude that the statute did not intend, nor contemplate, that the 707 consideration should necessarily be part of a 701 hearing.

In fact, the whole philosophy of the present Juvenile Court Law is counter to the interpretation now urged. The purpose of requiring separate consideration of wardship and of disposition was to prevent the court from being affected, at the first stage, by evidence of the minor's character not relevant to determination of his guilt. (*In re Gladys R.* (1970) 1 Cal.3d 855 [83 Cal.Rptr. 671, 464 P.2d 127].) To require or even permit the introduction at the 701 hearing of the kind of data on which a 707 determination is made would violate both the letter and the spirit of the statute.[5]

We are aware of the language in *People v. Brown* (1970) 13 Cal.App.3d 876 [91 Cal.Rptr. 904], which seems to hold that the 707 finding must be made during a 701 hearing and prior to the conclusion of that stage. But that language is dicta; the 707 finding had been made during the 701 hearing; no objection was made to the consideration at that point of the evidence leading to the 707 decision. Under these circumstances, decision as to the point herein involved was not necessary for the decision of the case and, for the reasons above set forth, we are not inclined to follow it.

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[5]Of course, we do not imply that evidence might not properly be offered and received at the 701 hearing which would, in and of itself, show that the minor was not one for whom juvenile court processes were appropriate.

III

(2) We conclude also that the constitutional rights against double jeopardy were not violated by the procedure herein adopted. It is clear that, at the time when the present Juvenile Court Law was under consideration, it was not thought that the concept of double jeopardy, as applied to adults in criminal cases, was applicable to juvenile court proceedings. In fact, the recommendation of the Special Study Commission, which drafted the proposals forming the basis for the 1961 revision, said:

"Recommendation No. 6

"Prohibit minors from being subject to criminal prosecution based on the facts giving rise to a juvenile court petition once final judgment has been made in the juvenile court, except that a finding of unfitness in the juvenile court shall not constitute final judgment in the terms of this recommendation.

"Comments:

"There are several cases on record where juveniles have been tried and sentenced in a criminal court for an offense upon which final judgment was previously made in the juvenile court. Such a course of action, while rare, is unfortunately permissible under the present juvenile court law.

"In an adult case, this is prohibited because it would constitute placing the individual in double jeopardy. The Commission sees no valid reason why juveniles, as well, should not be protected from such proceedings.

"In so recommending, the Commission proposes that the proceeding by which a minor is found unfit for processing in the juvenile court shall not constitute

final judgment in terms of this recommendation. Thus, the information disclosed at the juvenile court hearing in certified cases would be permitted to be considered in the criminal courts."

That recommendation is now embodied in section 606 of the act.

Ten years later, in *Richard M. v. Superior Court* (1971) 4 Cal.3d 370 [93 Cal.Rptr. 752, 482 P.2d 664], the Supreme Court determined that, in view of decisions of the United States Supreme Court which had been rendered after the present Juvenile Court Law was adopted: ". . . [i]n proceedings before the juvenile court juveniles are entitled to constitutional protections against twice being placed in jeopardy for the same offense." The issue before us is whether that proposition operates to bar the kind of disposition of a juvenile case that was made here. We conclude that it does not.

There are three situations in which it could be contended that the constitutional rights had been violated: (a) where, as in *Richard M.*, the minor is, in effect, found not guilty of the offense underlying the section 602 petition; (b) where the minor is made a ward under section 701 and the 702 hearing has resulted in a treatment disposition order under section 725—here both section 606 and the Constitution would prohibit a renewal of the case in another court; (c) the case at bench, where no final disposition order has been made.

In the situation before us, while it is true that, under the language in *Richard M.*, jeopardy had attached once the first witness had testified at the 701 hearing, no *new* jeopardy has arisen by the proceedings sending the case to the criminal court. The entire Juvenile Court Law contemplates a careful determination, on a case-

by-case basis,[6] as to the type of procedure most likely to protect society and to rehabilitate the minor. Under some circumstances, a minor will grow from the criminal court to the juvenile court; in other cases he will go from the juvenile court to the criminal court. But, until one court or the other reaches a final disposition of the case, only a single jeopardy is involved. In *Richard M.*, the Supreme Court impliedly felt this to be true; in recounting the risks which that minor had faced, the court enumerated not only the possibility of a disposition at a 702 hearing but it expressly mentioned the very possibility which has here occurred.[7]

In short we can find neither statutory nor constitutional objections to the order herein attacked. The petition for a writ of habeas corpus is denied.

Files, P. J., and Jefferson, J., concurred.

Petitioner's application for a hearing by the Supreme Court was denied August 4, 1971. Peters, J., was of the opinion that the petition should be granted.

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[6]*Jimmy H. v. Superior Court* (1970) 3 Cal.3d 709 [91 Cal. Rptr. 600, 478 P.2d 32]; *Bruce M. v. Superior Court* (1969) 270 Cal.App.2d 566 [75 Cal.Rptr. 881].

[7]"The minor was exposed to the possibility that an adjudication would be made; that the court might then proceed to the dispositional phase of the bifurcated juvenile court proceedings (§ 702); and that, since an uncontested hearing was anticipated that the Social Report and Recommendations of the Probation Officer were prepared and available (§ 702). The minor was not immune from the possibility that the court would determine that he was not amenable to the programs available to the juvenile court and that it might direct that he be prosecuted under the applicable criminal statute (§ 707)." (*Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 376 [93 Cal.Rptr. 752, 482 P.2d 664].)

Supreme Court, U. S.
FILED
DEC 12 1974
MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI FILED JULY 8, 1974

WRIT OF CERTIORARI GRANTED OCTOBER, 21, 1974.

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RELEVANT DOCKET ENTRIES— DISTRICT COURT.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendant of the Southern Regional Center Clinic, California Youth Authority, Respondents. 71-2907-LTL.

Date Proceedings

12/10/71—Filed order (ALS) that action may be filed without prepayment of filing fee and that further action proceedings be subject to order of Court. Filed Petitioner's application for leave to proceed in forma pauperis. Filed affidavit of Donald W. Pike. Filed affidavit of Robert L. Walker. Filed Petition for Order appointing Guardian Ad Litem. Filed order (ALS) that Lola Mae Jones be appointed as Guardian Ad Litem of Minor Gary Steven Jones. LODGED Order granting leave to proceed in Forma Pauperis NOT signed. Filed Petition for a Writ of Habeas Corpus for Release of Person from State Custody. Filed Petitioner's Points and Authorities in support of Relator's Petition for Writ of Habeas Corpus. Issued summons.

12/16/71—Filed petitioner's application of non-resident attorney to appear in a specific case and order (LTL) by naming Robert L. Walker.

12/20/71—Filed order (LTL) requiring response to petition for writ of habeas corpus.

1972

1/10/72—Filed respondent's response to petition for writ of habeas corpus.

1/13/72—Filed petitioner's reply memo.

1/20/72—Filed petitioner's certificate of service.

1/27/72—Filed order (LTL) for hearing to be set 3/6/72, 10 a.m.

3/6/72—Held hearing and entered order (LTL) Petitioner's petition for Order to Show Cause why petition for writ of habeas corpus should not be issued is order submitted (LTL).

5/5/72—Filed memorandum and order denying petition for writ of habeas corpus and notified parties.

6/5/72—Filed petitioner's NOTICE OF APPEAL. Filed petitioner's Designation of Record on Appeal. Filed petitioner's Certificate of Service.

6/9/72—Filed petitioner's petition for certificate of probable cause.

6/21/72—Filed order (LTL) of petition for Certificate of Probable Cause in the above matter denied.

9/5/72—Received from Court of Appeals copy of order of Court of Appeals granting certificate of probable cause.

9/6/72—Issued and forwarded to Court of Appeals original record on appeal.

9/25/72—Filed motion, affidavit and order re Appeal in Forma Pauperis—Motion denied (LTL)

9/27/72—Received from Court of Appeals copy of order of Court of Appeals permitting pauper appeal.

RELEVANT DOCKET ENTRIES— COURT OF APPEALS.

United States Court of Appeals for the Ninth Circuit.

D.C. No. 71-2907-LTL.

D.C. Judge L.T. Lydick.

Notice of appeal filed 6-5-72.

497 Fed. Rep. 2nd. p. 1160.

Filed in DC: 12-10-71.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem. Petitioner-Appellant, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. 72-2644.

For Appellant: Peter Bull, Esq. and Robert L. Walker, Esq. of the Youth Law Center.

For Appellees: Evelle J. Younger, Calif. Atty. General and Russell Iungerich, Deputy Atty. General.

72-2644

Date	Filings—Proceedings
1972	
Sept. 19	Filed certified transcript of record on appeal (received Sept. 7, 1972) in one volume, pleadings, original copy.
Sept. 19	Docket fee paid, cause docketed and entered appearances of counsel.
Sept. 20	Received original and 3 copies of motion for leave to appeal in forma pauperis.

Sept. 25	Filed order granting motion requesting leave to appeal in forma pauperis.
Oct. 6	Sent one copy of one-volume record to appellant's counsel Walker, Youth Law Center; Appellant's opening brief due Nov. 15, 1972.
Nov. 13	Received original and 3 appellant's motion for extension of time to file brief.
Nov. 13	Received letter of 11/9 from U.S. Attorney regarding possible motion to dismiss appeal.
Nov. 16	Filed motion and order extending time to file appellant's brief to Dec. 15, 1972.
Dec. 12	Filed 25 Appellant's Briefs.
1973	
Jan. 14	Filed 25 Appellee's Briefs.
Jan. 29	Filed 25 Appellant's Reply Briefs.
1974	
Jan. 7	Received letter from appellant's counsel Pike advising of his withdrawal as one of appellant's counsel.
Jan. 17	Received letter from appellant regarding additional citation, with copies of 5th Circuit decision in *Fain v. Duff*.
Feb. 24	Argued and submitted to: Goodwin, Wallace, C.J.J., East, D.J.
Mar. 19	Received appellant's letter with copies of documents requested by clerk March 12. 1974.

Mar. 25—Received appellant's letter submitting 4 copies of Section 34 of Uniform Juvenile Court Act.

May 15—Ordered opinion (Wallace) filed and judgment to be filed and entered.

May 15—Filed opinion—reversed with directions for the district court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition.

May 15—Filed and entered judgment.

May 31—Filed appellee's motion for stay of mandate.

June 3—Filed appellant's opposition to motion for stay.

June 18—Filed Order Staying Mandate to 7/5/74.

July 8—Advised by Supreme Court (Miss Lazowski) that petition for certiorari filed 7/8/74—Supreme Court No. 73-1995.

July 15—Filed Supreme Court notice re: filing petition for certiorari July 8, 1974 S.C. #73-1995.

PETITION FOR WRIT OF HABEAS CORPUS.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907-LTL.

Filed: Dec. 10, 1971.

TO: THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

The petition of LOLA MAE JONES, on behalf of minor GARY STEVEN JONES, respectfully shows:

1. I am the mother of GARY STEVEN JONES, an eighteen year old minor, on whose behalf the present petition is brought. I am the duly designated guardian ad litem for purposes of bringing this petition and am personally authorized by the minor to make this application on his behalf.

2. Said minor is presently confined at California Youth Authority's Southern Regional Reception Center Clinic, whose street address is 13200 South Bloomfield Avenue, Norwalk, California. He is restrained of his liberty by ALLEN F. BREED, Director of the California Youth Authority, and by ROBERT McKIBBEN, Superintendent of the C.Y.A. Southern Regional Reception Center Clinic. Said minor is confined pursuant to an order of the Superior Court for the County of Los Angeles, entered October 21, 1971, finding Gary Steven Jones guilty of robbery in the

first degree and committing him to the California Youth Authority.

3. The Superior Court order pursuant to which the minor is confined is patently illegal because Gary had previously been placed in jeopardy by the Superior Court of Los Angeles County, Juvenile Court Department, which on March 1, 1971 found him to be a juvenile delinquent under California Welfare and Institution Code § 602. This adjudication was based upon the identical armed robbery incident for which Gary was later prosecuted in adult court and convicted of violating Penal Code § 211. This second prosecution and conviction of said minor for the same incident for which he had previously been adjudged a juvenile delinquent was in violation of his right not to be twice placed in jeopardy guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

4. The pertinent facts are as follows. On February 9, 1971 a petition was filed against said minor in the Superior Court of Los Angeles County, Juvenile Court Department, under case # 394,221. This petition alleged that he was a juvenile delinquent in that he had committed acts which—if he were an adult—would constitute a violation of Cal. Penal Code Section 211 [the juvenile court petition is annexed as Exhibit "D"].

5. A detention hearing was conducted on February 10, 1971 at the conclusion of which the juvenile court ordered the minor detained. The jurisdictional hearing was held before Referee Jules D. Barnett on March 1, 1971. After hearing testimony, including the testimony of Gary Steven Jones, the court sustained the petition, specifically finding that the minor was a person

described by Section 602 of the Juvenile Court Law. The Court also ordered that the minor should remain detained at Juvenile Hall [the findings and order of Referee Barnett are annexed hereto as Exhibit "E"].

6. Said minor was represented by court-appointed counsel at both the detention and jurisdictional hearings. On March 15, 1971 the Court appointed Donald W. Pike, Esq., co-counsel herein, to represent the minor at the dispositional hearing. Pursuant to Section 707 of the Cal. W&I Code, the court at that hearing announced its intention to find that the minor was not amenable to the Juvenile Court processes and to direct the district attorney to prosecute the minor under Section 211 of the Penal Code. Counsel objected, and the probation officer was ordered to submit a behavioral report. The minor was remanded to the custody of the sheriff.

7. On March 22, 1971 counsel submitted written points and authorities which challenged the contemplated 707 procedure on double jeopardy and due process grounds. Acting upon the recommendation of the Probation Department, the court overruled counsel's objections, remanded the minor to the sheriff's custody, and ordered that the minor be prosecuted as an adult [the Reporter's Transcript of these proceedings is annexed as Exhibit "F"].

8. A petition for a writ of habeas corpus was prepared and filed with the Superior Court of the State of California for the County of Los Angeles. In the writ petitioner specifically argued that he was being denied his federal constitutional right not to be twice placed in jeopardy. After hearing oral argument on April 2, 1971, the Honorable Marvin A. Freeman

denied the writ on the basis that relator's statutory and constitutional rights had not been violated [the minute order of the Court and Reporter's Transcript are annexed as Exhibits "G" & H""]. Donald Pike, co-counsel herein, was appointed to represent the minor in the adult proceedings and to take any appropriate steps to review the court's order.

9. Subsequently, a petition for a writ of habeas corpus raising the same constitutional and statutory claims was filed in the California Court of Appeal, Second Appellate District, under Crim. # 19956. On April 12, 1971 the court stayed the pending criminal prosecution of the minor. An order to show cause was issued on May 7, 1971, and on May 19, 1971 the court denied the petition in an opinion by Justice Kingsley which is reported at 17 Cal.App.3d 704, 95 Cal.Rptr. 185 [annexed hereto as Exhibit "C"]. The court rejected petitioner's contentions on the merits, and held that although jeopardy had attached in the original juvenile court proceeding, no new jeopardy would attach in the subsequent prosecution in adult court.

10. Subsequently, a petition for hearing was filed with the California Supreme Court raising the same constitutional and other claims. On August 4, 1971 the Court denied a hearing [a photostatic copy of the post card apprising petitioner of the court's decision is annexed as Exhibit "I"].

11. On August 23, 1971 a preliminary hearing was conducted in the Municipal Court, South Bay District, Los Angeles County, under case No. A 174204 before the Honorable George R. Perkovich. The hearing was held pursuant to a complaint charging GARY STEVEN JONES with having committed armed robbery on or about February 8, 1971. Defendant entered a plea of

not guilty and a plea of once in jeopardy and once convicted and submitted this latter plea in writing [Exhibit "J"]. At the conclusion of the hearing defendant was remanded to Superior Court [the Reporter's Transcript is annexed as Exhibit "K"].

12. On September 3, 1971 a felony information [Exhibit "L"] was filed against the minor in case No. A-174204 charging him with robbery in violation of Penal Code § 211. Defendant pleaded not guilty, and on September 29, 1971 the cause was submitted to the Honorable Auten F. Bush, sitting without a jury, on the transcript of the preliminary hearing, and defendant was convicted of violating Penal Code § 211 [minute order annexed as Exhibit "M"]. On October 20, 1971 the minor was committed by the Court to the California Youth Authority [minute order annexed as Exhibit "N"].

13. During all of the criminal proceedings in the Municipal and Superior Courts defendant was represented by his court-appointed counsel, and co-counsel herein, Donald W. Pike. During the proceeding in the California Court of Appeal and on his application for a petition for hearing to the California Supreme Court, the minor was represented by Donald W. Pike, Peter Bull, and Robert L. Walker, his counsel herein.

14. Upon the advice of counsel no appeal has been sought from the judgment of the Superior Court of Los Angeles County convicting said minor of robbery in the first degree. It is the considered opinion of petitioner, minor, and counsel [see affidavit of Donald W. Pike annexed as Exhibit "A" and incorporated by reference herein] that the only appealable issue in this case is whether said minor has been twice placed in jeopardy in violation of his constitutional rights. This

argument has already been presented to, and rejected by, both the California Court of Appeal and the Supreme Court of California. The minor has thus exhausted his state remedies under 28 U.S.C. § 2254, and presenting the same arguments to the same courts a second time would be futile and ineffective to protect his rights.

15. This petition has been prepared by attorney Robert L. Walker. According to his annexed affidavit [Exhibit "B" incorporated by reference herein], this petition contains all of the information required by Local Rule 19 of the Rules of this Court.

16. As a result of his criminal conviction for armed robbery, GARY STEVEN JONES suffers from many disabilities which would not exist if he were merely a ward of the juvenile court. He is a convicted felon (Cal. Penal Code §§ 17, 213) and is, therefore, not entitled to have his conviction record sealed (see Cal. Penal Code § 1203.45), whereas all juvenile court records are sealable under Cal. W&I Code § 781. Although there is no way to determine if the juvenile court would have committed Gary to the California Youth Authority, the potential duration of his commitment to the Youth Authority by the juvenile court could have been until he reached age twenty-one (Cal. W&I Code § 1769), whereas presently he may remain in the Youth Authority until he reaches age twenty-five (Cal. W&I Code § 1771). In addition, under certain conditions the Youth Authority may return him to Superior Court for sentencing to state prison (Cal. W&I § 1737.1). But he could never be sentenced to state prison once he was committed to the Youth Authority as a ward of the juvenile court even if he were returned by the Youth Authority as incorrigible. Other ways in which the minor petitioner is seriously prejudiced

by his unlawful conviction as an adult felon are fully set forth in Point IV of his Points and Authorities filed with this petition.

17. Because of the foregoing facts, GARY STEVEN JONES is being restrained of his liberty in violation of the Constitution of the United States. The waiver of minor to adult court pursuant to Cal. W&I Code § 707 and subsequent trial of minor in adult court after jeopardy had attached in the juvenile proceeding placed him in double jeopardy. Since Cal. W&I Code § 707 has been construed by California state courts to authorize this procedure, that statute is unconstitutional.

WHEREFORE, it is respectfully prayed that a writ of habeas corpus issue directing said minor's release from the unlawful detention and remanding said minor to the custody of the Juvenile Court of Los Angeles County for disposition pursuant to that Court's previous finding that the minor is a person described by Section 602 of the California Welfare and Institutions Code, or in the alternative, this Court should issue an order directing respondents BREED and MC KIBBEN (depending upon whether Gary has been transferred to the Youth Authority's Southern Regional Reception Center Clinic) or their legal representative, to show cause why such a writ should not issue, and for such other and further relief as law and justice may require.

Subscribed and sworn to before me this 24th day of November, 1971.

/s/ Lola Mae Jones
Lola Mae Jones

/s/ G. L. Washington
Notary Public

EXHIBIT A—AFFIDAVIT OF DONALD W. PIKE.

(This exhibit has been omitted because it pertains only to the question of exhaustion of state remedies.)

EXHIBIT B—AFFIDAVIT OF ROBERT L. WALKER.

(This exhibit has been omitted because it pertains only to compliance with local Rules of Court.)

EXHIBIT C—OPINION OF THE CALIFORNIA COURT OF APPEAL.

(This exhibit has been omitted from this Appendix because it appears as Appendix C to the Petition for Writ of Certiorari, pages 20-27.)

EXHIBIT D—JUVENILE COURT PETITION.

Superior Court of California, County of Los Angeles Juvenile Court.

PETITION

In the Matter of Gary Stephen Jones, a minor. Number 394221-0317197-SC-ACT.

Petitioner is informed and believes and therefore alleges, that Gary Stephen Jones, hereinafter called minor, resides at 943 West 134th Street, Compton, California, and was born on 6/22/53 and was 17 years of age on June 22, 1970, and comes within the provisions of Section 602 of the Welfare and Institutions Code of California, in that: said minor, on or about February 8, 1971 at 16201 South Hawthorne Boulevard, County of Los Angeles, did willfully and unlawfully by means of force and fear take from the person, possession, and immediate presence of James Mattera, the following described personal property to wit: a cash register containing money; thereby violating Section 211 of the Penal Code of California.

Further, at the time of the commission of the above offense, the minor was armed with a deadly weapon, to wit: a gun.

The name and residence address of each parent and guardian of minor, known to me, is as follows: Mother: Lola Jones, 943 West 134th Street, Compton, California.

Minor was taken into custody by Lennox Sheriff's Station on 2/8/71 at 10:10 P.M. Minor is detained. The present whereabouts of minor is Juvenile Hall.

Therefore, petitioner respectfully requests that this minor be adjudged and declared a ward of the Juvenile Court and dealt with as such.

KENNETH E. KIRKPATRICK,
PROBATION OFFICER, Petitioner
By /s/ T. Fay
T. FAY, IDC
Deputy Probation Officer

I certify under penalty of perjury that the foregoing is true and correct, according to my information and belief.

Executed at (City)
LOS ANGELES, California
/s/ T. Fay
Signed

EXHIBIT E—FINDINGS AND ORDER OF JUVENILE COURT REFEREE.

Superior Court of the State of California, for the County of Los Angeles, Juvenile Court.

Date: March 1, 1971.

Hrg. Room 5.

Judge:

Referee: Jules D. Barnett.

Deputy Clerk: Marie Franks.

Deputy Sheriff: Ralph Calderon.

Probation Officer: S. Canin.

DPSS Social Worker: .....

Reporter: Irma Demar.

In the Matter of Gary Stephen Jones, 17 years of age, a minor. No. 394221-0317197-SC.

FINDINGS AND ORDER OF REFEREE

Appearances: Attorneys: Stephen Behrendt; Deputy District Attorney, Norman F. Montrose.

Adjudication Proceedings: The 602 petition filed February 10, 1971, is read to those present, and the minor and any parent or guardian or adult relative are informed of their right to counsel, the nature of the hearing, its procedures and possible consequences.

Pursuant to Section 700 of the Juvenile Court Law, conflict matter, Private Counsel is appointed as counsel for minor.

The parent or guardian or adult relative present, being advised of his rights, indicates his desire to proceed without independent counsel.

Minor denies the allegations in paragraph I of the petition filed February 10, 1971 (as amended).

Minor with the advice of counsel waived his rights and testified.

Sworn and Testifying: Minor; James Matern; Dep. Frank Gomez, LASO.

Sworn Only: Deps. Fred Laxon and William Hess, LASO.

The Court Orders:

Petitioner's Exhibits 1 (black cash register tray); 2 (.38 calibre Smith and Wesson, brown wood handle, Serial No. 28880); 3 (.38 calibre Iver Johnson, Serial No. G 30691) and 4 (blue woolen cap) are admitted into evidence by reference to Case No. A 173344, Superior Court.

THE COURT FINDS:

1. That notice of this hearing has been duly given as required by law.

2. That minor was born on June 22, 1953.

3. That the allegations of the petition filed February 10, 1971 (as amended) are true, and the petition is sustained.

4. That minor is a person described by Section 602 of the Juvenile Court Law.

THE COURT ORDERS:

That minor shall remain detained at Juvenile Hall pending the disposition hearing.

Proceedings continued for disposition to the appearance calendar of March 15, 1971, at 9:00 a.m. in Dept. L.A.

All parties present to return on that date without further order, notice or subpoena.

/s/ Jules D. Barnett
Referee of Juvenile Court

This Order Was Entered.

William G. Sharp,
County Clerk and
Clerk of the Superior Court

Names and addresses of persons to be served with copies of this order:

Minor: Juvenile Hall.

Mother: Lola Jones, 943 West 134th Street, Compton, California.

Attorney: Stephen Behrendt, 9465 Wilshire Boulevard, Beverly Hills.

EXHIBIT F—REPORTER'S TRANSCRIPT OF JUVENILE COURT PROCEEDINGS, MARCH 15, 22, 1971.

Superior Court of the State of California, for the County of Los Angeles.

Hearing Room No. 5.

Hon. Jules D. Barnett, Commissioner.

In the matter of Gary Steven Jones, a person under the age of 21 years. No. 394221.

REPORTER'S TRANSCRIPT

March 15, 1971.

March 22, 1971.

APPEARANCES:

For the Minor: Donald W. Pike, Esq., 424 South Beverly Drive, Beverly Hills, California.

Also present: Gary Steven Jones, Minor; Minor's mother; Eileen Harney, Probation Officer; Ann Chaus, Court Officer; Robert E. Knourek, CSR Official Pro Tem, 1601 Eastlake, Los Angeles, California.

LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 15, 1971; A.M.

THE COURT: We have the matter of Gary Steven Jones coming up. Mr. Pike represents the young man and we have the mother of the young man here. And do we have any communication with Mr. Jones, the father? I note a different address.

MINOR'S MOTHER: We are divorced.

THE COURT: I know that.

(Discussion.)

THE COURT: All right, we will proceed. We have the probation officer in this matter.

MISS HARNEY: Eileen Harney H-a-r-n-e-y.

THE COURT: Would you all please stand and raise your right hands?

(Whereupon the Court administered the oath to all the people in the courtroom.)

THE COURT: Be seated please.

We have a probation officer's report and recommendation to be considered. This, of course, is triggered by a petition which was sustained after the taking of testimony in this court and the Court has read and considered the recommendation and receives it into evidence and the recommendation here is two-fold—I guess—that the Minor be considered for unfitness and/or be committed to the Youth Authority.

And I will hear your comments, Mr. Pike.

MR. PIKE: Well, your Honor, I am placed in a position here with this report making the 707 recommendation, that if the Court gave an indication that there was—that it was going to follow that recommendation, I would have a different argument, I believe.

THE COURT: Well, we have a technical problem here of which you are aware that prior to a declaration of unfitness being made, we must receive and consider a behavioral report.

MR. PIKE: Yes.

THE COURT: Of course, we can do violence to procedure by considering this report a behavioral report and it might well be the same thing.

However, the thing which concerns me is quote why I didn't consider a behavioral report when I heard this matter and the only explanation I may have is that I must have considered it and yet disregarded it for some reason.

The report of this young man is truly horrendous and I recall the case and the testimony taken and we have the probation officer in court and it would appear that the sum total of what has gone before may well be having undue influence upon me.

MR. PIKE: It would appear to me, your Honor, that this is a proper case for the California Youth Authority facilities, particularly in view of the psychiatric discussion that is contained within the report, because I am not aware of any County facility which would have the kind of examination that this Minor is obviously in need of.

THE COURT: Oh, now, the only question here is whether we CYA the youngster or declare him unfit.

I will hear you Miss Harney, if you have any comment to—

MISS HARNEY: Well, actually my original recommendation one would be CYA because of his psychiatric elements and which I discussed with my superior and they felt that it wasn't enough, so to speak, but I still feel, personally, that CYA would be proper because even though the acts committed are extremely serious in nature, I do feel that the Minor is still somewhat immature and does have extreme problems which I think need to be met and my feelings would be that they might not be met if he was considered unfit and declared adult.

THE COURT: I happen to disagree with you.

They have the same facilit- in adult court that they have in juvenile court. They have greater facilities. This young man has been a gun man ever since he started. His whole history is replete with the use of guns and it is a pretty alarming situation—16 and a half years old, right?

MR. PIKE: (Nodding his head.)

THE COURT: Is that correct?

MISS HARNEY: No, 17.

MINOR'S MOTHER: He is 17.

MISS HARNEY: He will be 18 in June.

THE COURT: He will be 18 in June.

MR. PIKE: He hasn't been to a camp at all, your Honor. I understand that is—

THE COURT: No, Mr. Pike. All I see here—this, of course, is the most alarming thing I have seen in my life.

This youngster goes back with guns to 1970—loaded .22 caliber Browning automatic pistol in his pocket.

There was a behavioral—an unfitness hearing held in June of 1970 and he was continued as a juvenile.

And, again in 1970, the second gun charge—am I right, Mr. Pike, in reading the file?

MR. PIKE: That is correct.

THE COURT: He has two gun charges in 1970 and then he has another gun charge in front of me. And he has two companions against whom proceedings are being held pending as adults for this same affair; is that correct?

MR. PIKE: I am not sure about that, your Honor.

MISS HARNEY: Yes, one of those was previously on a juvenile case load at South Central, but it is now being tried as an adult and the other one wasn't an adult—a sibling.

THE COURT: Right. Three times arrested; three times use of a gun. I am going to have to consider this for unfitness.

MR. PIKE: Your Honor, at this time I would make a motion to continue the matter on the ground of surprise.

Minor was not informed that it was going to be a fitness hearing.

MISS HARNEY: Minor was informed.

THE COURT: Just a moment. When was that—just a moment, finish the statement.

MR. PIKE: At the time Minor was last in court, it was continued for disposition hearing, and counsel at that time would have advised the Minor with regard to handling the matter as a juvenile on a disposition hearing, had I been his counsel.

However, I would also move to strike this report on the grounds that the probation officer, in preparing a disposition matter where the Minor doesn't know that she is preparing for a fitness hearing, has disclosed confidences to his probation officer which I would move to strike.

I move to strike the disposition report from the file and have it removed from the file and on the grounds that there has been a miscarriage—a lack of due process under the 14th Amendment and a breach of the confidential relationship established between the Minor and the probation officer.

THE COURT: Insofar as striking the report, that motion is denied.

However, we will, under the circumstances, set this for the technical behavioral report procedures. Notice must be given, and notice is hereby given officially.

The matter will be set for one week hence and you will prepare a behavioral report, Miss Harney, and in the interim the youngster will be confined in the County Jail.

MR. PIKE: May I, for the record, make one other objection, your Honor? I would object on the grounds of violation of the 6th Amendment of the Constitution

of the United States, that this Minor has been subjected to double jeopardy and further objection—violation of the 6th Amendment, that after adjudication that the Minor is being subjected to additional punishment more than would be rendered under the juvenile court at the time of the adjudication and it must only be for grounds that occurred prior to the time of the adjudication and I would ask the Court permission to submit written points and authorities and on the grounds that the Supreme Court ruled in the case—in New Jersey that punishment cannot be increased after the adjudication hearing except for offenses for matters that occurred after the time of the adjudication.

There are two United States Supreme Court cases, two years ago.

THE COURT: Mr Pike, this Court takes strong issue when you use the words "punishment increased". We are concerned with the rehabilitation of this youngster and we feel that the facilities of the juvenile court may not be sufficient as I have indicated to you.

I have not precluded or foreclosed any further argument by you. Now, about whether as a personal matter you can continue with this matter, that is something that I don't know. Do you wish to submit findings in any event?

MR. PIKE: I would like to write a memorandum.

THE COURT: I commend you for that and appreciate your intent and it will go back on my calendar for the purpose of accepting it. It might not be accepted before another commissioner.

If you will, I would appreciate your points and authorities sent to my attention for me to consider at the behavioral hearing which will be a week from today on the 22nd.

MISS CHAUS: Do you wish the behavioral report—this report would not be any different from the report that is now—

THE COURT: Miss Chaus, the requirements of the statute are that we receive a behavioral report, and no disrespect to counsel, there is no need to leave open a procedural hole in the proceedings here.

So we will have to do it just as the requirements are set forth. I will put this notation down to myself. Attorney Pike is to send points and authorities to me and I state for the record that I shall consider the said points and authorities prior to my making a ruling; the ruling which I have not in any way indicated, but I wish to explore the entire possibility and the matter will be set down on my calendar.

MISS HARNEY: Your Honor, is it possible that during this week's period to have a private psychiatric report?

THE COURT: No, I don't know if it can be arranged through the—

MISS HARNEY: I noticed that at the last fitness hearing that the Minor had—there was a psychiatric report submitted.

THE COURT: This is 1970. It is not that far back that we have to have a new one.

MISS HARNEY: It was not submitted into court records. It was submitted for the eyes of the Minor's counsel only.

THE COURT: I can only assume that the psychiatric report is not helpful in any way to the Minor.

Mr. Pike, I am glad that you concur with that.

MR. PIKE: That is correct.

THE COURT: Submit your report at the behavioral hearing—what you know about the youngster's background, et cetera, et cetera—on my calendar on the 22nd—3/22.

One final factor, Miss Chaus: We have an address of the father and make sure that he is served.

MISS CHAUS: Yes, sir.

THE COURT: My calendar, 3/22/71; and detained pending and at the County Jail.

MR. PIKE: County Jail.

THE COURT: That is right, and we will have it set for 9:00 o'clock in the morning.

Thank you very much. That is all. See you all back here then.

MINOR'S MOTHER: May I visit with him?

THE COURT: I am sorry. Since he is in the County Jail—what are the visiting hours?

MR. PIKE: I am not sure.

THE COURT: I think that you can during the week.

MR. PIKE: Between 10:00 and 12:00 and 2:00 or something in the afternoon.

THE COURT: Yes, at the County Jail facility.

Thank you.

LOS ANGELES, CALIFORNIA
MONDAY, MARCH 22, 1971; A.M.

THE COURT: We have the matter of Gary Steven Jones.

The youngster is here in court and is that you Gary?

THE MINOR: Yes.

THE COURT: And is the mother here?

MINOR'S MOTHER: Yes.

THE COURT: And Mr. Pike represents the youngster.

Would you both please stand and raise your right hands?

MISS CHAUS: Sir, the field probation officer.

THE COURT: Miss field probation officer, your name is?

MISS HARNEY: Eileen Harney H-a-r-n-e-y.

THE COURT: Would you please stand and raise your right hands?

(Whereupon the Court administered the oath to all the people in the courtroom.)

THE COURT: Be seated please.

When last you were in court, young man, a petition filed on your behalf was found true and just so that the record is quite clear, by the Court's sustaining the petition and found that you came within the provisions of Section 602 of the Welfare and Institutions Code. At that time—

This Court requests a behavioral report to be filed so that the issue of whether you are fit for further consideration as a juvenile can be raised and can be done in compliance with the statute.

The Court has for its consideration a behavioral report which it has read and considered together with all of the other information in the file, and it is the Court's intent to declare the youngster unfit for further treatment as a juvenile, and I will hear you, Mr. Pike.

MR. PIKE: Your Honor, it seemed to me that there was a hearing in this court where the Court found him to come within Section 602 and then it was continued for disposition.

THE COURT: Yes.

MR. PIKE: Is that correct?

THE COURT: Yes.

MR. PIKE: And that at the time of the disposition hearing the Matter was then again continued for five days for the fitness hearing which we are here for today.

THE COURT: (Nodding his head.)

MR. PIKE: Is that correct?

MISS CHAUS: Yes.

THE COURT: I will accept your recollection.

MR. PIKE: I offer in evidence a memorandum of points and authorities relating to this matter and—

THE COURT: Let the record reflect the fact that the Court has read it and discussed it actually with you. Is that correct?

MR. PIKE: Yes.

THE COURT: You may proceed. The memorandum is received into evidence.

MR. PIKE: Without going into argument on the memorandum of points and authorities, I would like, at this time, to call Eileen Harney.

THE COURT: Miss Harney, come up here, please.

EILEEN HARNEY,

a witness previously sworn, was examined and testified as follows:

THE COURT REPORTER: State your name, please.

THE WITNESS: Eileen E-i-l-e-e-n Harney H-a-r-n-e-y.

EXAMINATION

BY MR. PIKE:

Q Miss Harney, I have reviewed the report that you have submitted to the Court this morning which is dated March the 22nd, and in the first paragraph of that report you state, "reason for hearing," but I don't find a recommendation in the report.

A Well, according to the records that I found in the office it stated that a behavioral hearing is requested—that you submit a behavioral hearing and you do not necessarily make a recommendation.

Q I see. Are you familiar with the facilities available through the California Yough Authority for treatment of this Minor?

A In the past I am aware that the facilities have been quite good in the psychiatric department which is where I feel that the Minor needs help.

However, at this time, I am told that they are not as good as they have been.

Q Are you familiar with the facilities that are available through the adult authority for the treatment of a Minor?

A I believe those could be a variety of facilities.

Q But you are not familiar with them, are you?

A Beyond the fact of Wayside, County Jail and Youth Authority, not too much.

Q And do you have any information with regard to the handling of a Minor by the adult authorities after he has been declared unfit and if he were convicted as an adult?

A I do not, although I believe that he would probably be committed to the Youth Authority.

Q Do you know the reception centers it has in the State of California?

A No, I do not.

Q And so it is your belief that he would then go to the same Youth Authority?

A That's what I understand, but I do not know that to be a point of law.

MR. PIKE: No further questions.

THE COURT: Thank you very much, Miss Harney.

MR. PIKE: Your Honor, I personally called the local administrative office of the Youth Authority and discussed it with them, what possibly might happen to this Minor if he were convicted as an adult, and they tell me there are three reception centers in California.

One at Perkins, one at Tracy and one at Norwalk. That the facility at Tracy is being phased out by the Youth Authority and that 25 percent of the people they normally used to send to Tracy are now being sent to Norwalk and from the southern part of the state—25 percent from the northern part of the state that used to be sent to Tracy are now being sent to Perkins.

Originally Perkins and Norwalk received minors from juvenile court largely and Tracy received minors and adults from the adult court, but that most minors were sent to Norwalk from the adult court and only in exceptionally dangerous cases or exceptionally large persons under the age of 18 were sent to Tracy and that the local office's evaluation was that this minor would go to Norwalk if he were convicted as an adult.

Further that it was their policy now to attempt to separate Youth Authority persons from any adult authority person which means previously Tracy has been used as a reception center for both adults and Youth Authority and that it was the policy of the Youth Authority and adult authority that in the future they would attempt to treat at separate facilities persons committed to Youth Authority whether or not they were over the age of 18.

I visited the area in the County Jail where this Minor is detained and I was informed by the jailer that on his 18th birthday he would be removed from that facility and thereafter housed with the general population at County Jail without any special facilities.

The special facilities in which he is detained now are very primitive—three to a cell and probably the cell is about 8 by 12—8 by 14 with no windows and very close to the attorney room in the County Jail.

MISS HARNEY: He has been moved from that particular cell.

THE COURT: That is all right. Let counsel finish his argument.

MR. PIKE: I would argue that first—that the points and authorities set forth my feeling with regard to the improper hearing of a 707 at this time; and further I would argue that if the Court does find this boy to be unfit, that it is cruel and unusual punishment to send the Minor to the County Jail for a period of time that will be probably 90 to 120 days before he gets to sentencing again; when he will, in fact, go to the same reception center of the Youth Authority that he would go to from here—that we are not here to punish.

We are here to rehabilitate and that rehabilitation can only be impaired if the Minor is put in some kind of a primitive holding cell between now and the time that he finally works his way down to the Youth Authority.

THE COURT: Anything else?

MR. PIKE: No, your Honor.

THE COURT: Mr. Pike, your argument is not novel, actually, but it actually sets forth the reverse side of the Jimmy H. coin.

Jimmy H. says one of the factors—that merely because the disposition would be different if he were declared an adult, is not enough reason to declare him adult.

You, of course, espouse the other side of the coin. Merely because he should be a juvenile—so following Jimmy H. to its logical conclusion, the aspect of what will or will not happen should have no total bearing in these sense that it shouldn't be the complete—as Jimmy H. said—complete motivating factor.

So within the purview of that case, and within the purview of the Brown case which you are familiar with, the Court feels that the Minor is not a fit and proper subject to be dealt with as a juvenile and will declare him unfit.

This record I have read is one of the most threatening records I have read about any Minor who has come before me.

We have, as a matter of simple fact, no less than three armed robberies, each with a loaded weapon. The degree of delinquency which that represents, the degree of sophistication which that represents and the degree of impossibility of assistance as a juvenile which that represents, I think is overwhelming and bearing in mind that factor and all other factors which are relevant, all of which I have read and evaluated, I declare the youngster unfit for treatment as a juvenile and he will be turned over to the Sheriff and the District Attorney or other appropriate prosecuting officers shall prosecute the matter under the applicable criminal statute and the matter will be set over one month for a nonappearance report as to the progress of the adult action.

That is it, young fellow.

(Certifications and affidavits of service omitted in printing.)

EXHIBIT G—JUVENILE COURT MINUTE ORDER, APRIL 1, 1971.

Superior Court of the State of California, for the County of Los Angeles, Juvenile Court. Dept. 96.

Date: April 1, 1971.

Judge: Marvin A. Freeman.

Referee: .....

Deputy Clerk: N. Shigeoka.

Deputy Sheriff: A. M. Simpson.

Probation Officer: S. Canin.

DPSS Social Worker:

Reporter H. McCrea.

In the Matter of Gary Stephen Jones, a minor. No. 394221-0317197-SC 162.

MINUTE ORDER

Matter comes before the Court for hearing in re: Ex Parte Application for Petition for Writ of Habeas Corpus.

Attorney Donald Pike is appointed to represent minor pursuant to Section 700 of the Welfare and Institutions Code.

Petition for Writ of Habeas Corpus, preliminary statement, and Points and Authorities submitted In Propria Persona by minor's mother, Lola Jones, is received as filed by counsel, Donald Pike.

The Court states that in view of the importance of the issues which have been raised in the ex parte application for Petition for Writ of Habeas Corpus, the Court will hear oral argument on the Petition.

Matter is argued by counsel for the minor.

The Court now orders that the Petition for Writ of Habeas Corpus be denied.

Court Reporter, Helena Mc Crea, is ordered to prepare a transcript (original and two copies) of the proceedings held this date at a cost to the County of Los Angeles.

Counsel, Donald Pike, is further appointed to represent minor in the adult proceedings pursuant to Section 987.2 of the Penal Code of California, and to prosecute appeal, or take other appropriate proceedings to review the instant order.

The Clerk is directed to forward a copy of this minute order to Attorney Donald Pike, 424 South Beverly Drive, Beverly Hills, California 90212; and Helena Mc Crea, court reporter.

EXHIBIT H—REPORTER'S TRANSCRIPT OF JUVENILE COURT PROCEEDINGS, APRIL 1, 1971.

Superior Court of the State of California, for the County of Los Angeles, Juvenile Court.

Department No. 96.

Hon. Marvin A. Freeman, Judge.

In the Matter of Gary Stephen Jones, a person under the age of 21 years. No. 394221.

REPORTER'S TRANSCRIPT
April 1, 1971

APPEARANCES:

For the Minor: Donald W. Pike, 424 S. Beverly Drive, Beverly Hills, Calif. 90212, 553-8533; Kenneth E. Kirkpatrick, Probation Officer, By: S. Canin, Deputy Probation Officer; Helena M. McCrea, CSR, 1601 Eastlake, Los Angeles, Calif. 90033.

LOS ANGELES, CALIFORNIA, THURSDAY,
APRIL 1, 1971, 1:45 P.M.

THE COURT: In the matter of Gary Stephen Jones, this is the petition for writ of habeas corpus.

The minor in this matter is represented by conflict counsel appointed under section 700 of the Welfare and Institutions Code.

Although this is an ex parte application, in view of the importance of the issue which has been raised the court will hear oral argument upon the petition, counsel.

[Oral argument of counsel omitted.]

THE COURT: Certainly, the court had before it that time this question although it wasn't pointed up to

the court. So that the issue has inferentially at least been before an Appellate Court and there have been other cases, In Re Breck—

MR. PIKE: Jimmy H., I believe.

THE COURT: And Jimmy H. There have been several cases where the court has at least viewed section 707 and has not seen fit to raise any question about it as indeed it would if it was apparent there was some serious question of construction being placed upon it.

Our procedure of course is not exactly in accordance with 707. We do set the matter for a separate fitness hearing in these cases. Although 707 doesn't talk about a separate fitness hearing, it does however talk about the submission of a report on the "behavioral patterns", which was added. Perhaps it was simply an oversight in the section not to make it clear that you couldn't have the report on "behavioral patterns" unless you set a new and separate hearing. But that is exactly what we do. We set a separate hearing. Despite the fact that 707 as I construe it—and to repeat, I construe that section as giving the Juvenile Court the jurisdiction at any time before the disposition order to order a fitness hearing. In other words, I construe the language "At any time during a hearing" to mean at any time until the disposition order has been made.

Despite the fact, as I say, that this construction of the statute creates the obvious problems you have indicated I don't see how I can read the section as it is written any differently.

Now I am, of course, aware of those problems. I think not only the problems you raise but other problems. Not only do you have the question, if I understand you correctly, as to what is the juvenile to do if

the court has adjudicated the petition, finds the petition sustained. And now between that sustaining of the petition, the completion of the adjudication phase of the hearing and the disposition hearing he now has to decide how he should act and you of course have to advise him how he should act. Should he now act as perhaps he wants to act and tell everything to the probation department, everything about himself and thus create the possibility that instead of there being a disposition hearing there will be a hearing which will start out as a disposition hearing and will end up as an arraignment for a fitness hearing? If he doesn't open up with a probation officer there is of course the danger that the probation officer will find that he is so uncooperative that he cannot make a recommendation for the kind of treatment you think he really should have and, yet, as the attorney worrying about what might happen as the disposition hearing, you have to advise him to continue to more or less stand upon his constitutional right not to incriminate himself in the sense that he makes it likely for the court to set it for a fitness hearing. I see the difficulties you mentioned there.

There is also the difficulty that if in the adjudication hearing his counsel should say "You are fortunate they didn't send you over for a fitness hearing at the detention hearing. You are fortunate you are being tried in juvenile. The best thing for you to do since you are being treated as a juvenile to act as we originally thought a juvenile should act in Juvenile Court, namely, admit everything and that is the best way for you to be given the kind of treatment that you as a juvenile perhaps need." And yet you are afraid to do that because that admission one way or other may end him

up in the adult court where you would want to try the case totally differently.

The second danger of course is not obviated by saying the court should not have the jurisdiction to order a fitness hearing after the petition has been adjudicated because surely the decision to whether or not he should admit would come long before then—sometime before then.

What you are really saying is that even if we construe section 707 narrowly, that the hearing is over once the petition has been sustained, you sometimes have problems as to how to act when at any time the court may decide to call for a fitness hearing. I think that perhaps relates more to the constitutionality of this section than the construction because I think you would agree that the section must be read to at least give the court the right after the hearing has started and before the adjudication to set a fitness hearing for the minor.

Well, as I have said before, I construe the section as I have indicated. I think that is what the legislature meant. I think the legislature may have been thinking in pre-Gaultian terms. It certainly was thinking in pre-Gaultian terms because that was before Gault. It may well be that the legislature would not have enacted this statute after Gault had laid down the guidelines it did or establish the rules it did.

Your second question of course relates to the constitutionality and, again, we discussed this informally before this hearing, counsel, and rather than have you repeat on the record the argument you made then let me say this. We have followed section 707 in the Juvenile Court for a long time. Of course, we do not have a great number of fitness determined. I think that last

year the total number may have been about thirty cases where we found a minor unfit. In previous years it was substantially less. Even though there have not been a great number, we nevertheless have clearly followed the policy of recognizing 707 as giving the court the jurisdiction to set a fitness hearing after the commencement of the introduction of testimony at the adjudication in the Juvenile Court.

For the moment let's ignore the question as whether before or after the adjudication. I do not think it would be proper for me to rule now that this section is unconstitutional. As I say, we have not introduced any substantial evidence regarding the amenability during the adjudication so that we have not unconstitutionally in terms of fairness followed that language, particularly since it is not direct language but merely inferential. But where we have followed this section, previous judges have followed it. Now, since 1961 I would not declare the section unconstitutional insofar as it permits finding of unfitness after the adjudication proceedings have commenced, particularly, as I say, in light of the fact that I believe at least three times appellate courts have seen this section in one light or other and have not made any comment on possible unconstitutionality.

If the United States Supreme Court which has the ultimate responsibility on constitutionality may follow a doctrine of abstention it seems only appropriate that the trial court should follow a doctrine of abstention. I have considerable doubts about the constitutionality.

Let me say that I think that the presentation you made informally and in part here and in your documents, papers, clearly point up a problem in the proper representation of the minor which thus become his

problem in the fairness of the treatment he receives. I think you have pointed up enough so it would make one wonder whether the juvenile is not now, in the terms of Gault, again being treated worse than the adult. The fact that it is not double jeopardy, according to appellate cases does in a sense mean that the juvenile is treated worse than an adult. The adult never has to go through these two proceedings.

California Appellate Courts have stated that all that this second trial means is in effect that under certain circumstances we don't give certain juveniles the chance of remaining in Juvenile. Adults never have the chance of being in Juvenile so presumably juveniles cannot object if at least they have a chance and a few of them—if you want to talk in terms of groups—get sent out to the adult court on the individual case. Again, that is Brown, as I recall it. On the individual case I don't recall the exact language but the court with respect to the individual minor pointed up the fact that at most he had an inconvenience by having first been tried in juvenile and then sent over to adult.

In any event, the court reached the result that it was not double jeopardy, and it was pointed out in that case that his rights in the adult court were prejudiced by what happened in the Juvenile Court. I may say in that regard that it has been suggested that the way to solve that problem of the possible impairment of rights in adult court from there having been previous juvenile proceedings is by making the juvenile proceedings confidential and not being able to be used against the minor. I must say that doesn't impress me because if the minor admitted something in the Juvenile Court and named his companions nobody is going to eradicate from the minds of the district attorney or

other people the information they obtained. But even though I have considerable doubts as to how fair it is to have the minor go all the way through or even part of the way through or even just start a juvenile adjudication and then be able to send him over to the adult court I still would not declare the section unconstitutional. It is, I suppose a question of quantum in part.

There is one other thing I wanted to say on that. Of course the fitness hearing itself is a burden upon the minor that adults don't have. But I don't assume the minor can argue with that because I don't assume anybody would say it is unconstitutional to say that certain minors will not have the benefit of the treatment as minors.

Do you have anything to add, counsel?

MR. PIKE: Yes. There is a section, I believe it is 704 which gives the court authority when the court questions the possibility of the minor being amenable to the treatment and facilities available to the juvenile, that they can refer him to the Youth Authority under section 704. The language in that section, as I recall, says after the minor has been found to be a person who comes within section 602—

THE COURT: Yes.

MR. PIKE: As the court pointed out in interpreting the statute, it is peculiar that this statute appears before section 707 instead of after section 707, so that I may be reaching to draw an inference from that statute that the legislature enacted that to take care of the very kind of case we have here today.

THE COURT: As I look through these other sections I don't think the placement could really be of any significance. It is true that the disposition by the

court, 725, is after 707 but there are obviously previous sections. They talk in terms of the procedure to get the disposition hearing. I think the language of 707 is clear enough so that I don't think that the placement would be of any importance at all.

I don't disagree, counsel, as to what would be the better procedure. I have no doubt but that the better procedure is that at the detention hearing, the decision be made as to whether there should be a fitness hearing. At the detention hearing it is clear that the police report may be considered, anything probation introduces may be considered. There is no requirement that evidence be limited to competent evidence, and in the usual case it should be at the detention hearing.

I will go further and say I don't think that the Juvenile Court would be crippled if there were no 707 as it is now constituted, that is, I don't know our operation would really be hampered if the rule were laid down that at the arraignment or detention hearing or in any event before the introduction of evidence at the adjudication the court may set the matter for a fitness hearing.

I suppose that now and then a case might come up where at the adjudication hearing facts came out that would make the court realize that at a previous proceeding or hearing or at a previous time there should have been made an order that a fitness hearing be set. I suppose it would be best if we had a law that said that there would be a right upon the showing of evidence which was not before the court at the time of the detention hearing or, in any event, before the adjudication hearing. Perhaps something along those lines.

But we are not writing statutes here now and we are not establishing procedures here. We have only the question before us as to what 707 means. I have indicated the way it has been construed here and the way I intend to continue to construe it until the Appellate Court construes it differently or until it is appealed or amended and, as I have already stated, I will not declare it unconstitutional in light of all of these facts.

If you have nothing further, counsel—Let me add this finally. I think this is an important point though we don't have many cases and those cases where they do come up, there are serious offenses generally involved and minors generally with rather lengthy records or records of rather serious offenses. They are difficult cases. I recognize counsel's problems in these cases and I therefore will on the record now appoint you specially first to represent the minor in the adult court. It is my understanding you are going to ask for a continuance there?

MR. PIKE: That is correct.

THE COURT: And, secondly, to prosecute the appeal in this matter, which you have indicated you are going to take up one way or the other.

MR. PIKE: Thank you.

THE COURT: I will ask that you use clemency upon the county in terms of time expended. You have, I think, the matter very clearly in mind yourself so I think the formulation of the problem will not be difficult for you. There are no factual problems that would cause any difficulty, and I do hope you will be able to receive some help, as you have indicated, from some public law agency or private agency devoted to work in this field.

Also, in line with what I have said to you before, I have ordered the transcript of this proceeding to be prepared immediately. If the record does not indicate I ordered it, I do now order at county expense in view of the fact that the mother is receiving aid now.

MR. PIKE: An original and two, your Honor. The reporter has indicated to me that it would be less expensive if we ordered an original and two copies at this time although unless the writ were granted by whatever appellate court I took it to I would probably only need the original.

THE COURT: I think an original and two is called for. The extra expense is worth it. If nothing happens with this in the appellate court, I can use it as the formulation for some guidelines I will be promulgating in this court.

The petition for writ of habeas corpus is denied for the reasons stated on the record.

MR. PIKE: Thank you very much, your Honor.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

(Certification of court reporter omitted in printing.)

EXHIBIT I—NOTICE OF DENIAL OF STATE HABEAS CORPUS PETITION BY CALIFORNIA SUPREME COURT.

Clerk's Office Supreme Court, 4250 State Building, San Francisco, California 94102, Aug. 4, 1971.

Dear Sir: I have this day filed Order Hearing Denied.

In re: 2 Crim. No. 19956, Jones vs. Habeas Corpus.

Respectfully,

G. E. BISHEL
Clerk

EXHIBIT J—PLEA OF ONCE IN JEOPARDY ENTERED IN LOS ANGELES COUNTY SUPERIOR COURT.

DONALD W. PIKE
424 South Beverly Drive
Beverly Hills, California 90212
879-3611
Attorney for Defendant—Appointed
counsel under Section 987(a) of
the Penal Code

Superior Court of the State of California, County of Los Angeles, Southwest District.

People of the State of California, Plaintiff, vs. Gary Steven Jones, Defendant. No. A 174,204.

Filed Sept. 7, 1971.

ONCE IN JEOPARDY AND
ONCE CONVICTED

The defendant pleads that he has already been placed once in jeopardy and convicted of the offense charged, by the judgment of the Superior Court of the County of Los Angeles, Juvenile Court, rendered at 1601 Eastlake Avenue, Los Angeles, California, in Hearing Room 5, on the 1st day of March, 1971. Attached is a copy of the findings of that court.

/s/ Donald W. Pike
Donald W. Pike

EXHIBIT K—REPORTER'S TRANSCRIPT OF PRELIMINARY HEARING, AUGUST 23, 1971.

In the Municipal Court, South Bay Judicial District, County of Los Angeles, State of California.

Hon. George R. Perkovich, Judge, Division III.

The People of the State of California, Plaintiff. vs. Gary Stephen Jones, Defendant. No. A 174204, Vio. Sec. 211, Penal Code.

REPORTER'S TRANSCRIPT
OF PRELIMINARY HEARING
MONDAY, AUGUST 23, 1971

APPEARANCES:

For the People: Nikola M. Milulcich, Esq., Deputy District Attorney.

For the Defendant: Donald W. Pike, Esq., 424 South Beverly Drive, Beverly Hills, California.

Reported by: Sandra B. Pister, CSR.

TORRANCE, CALIFORNIA: MONDAY,
AUGUST 23, 1971; 11:00 A.M.

THE COURT: People vs. Jones.

MR. MILULCICH: The People call James Thomas Mattera.

MR. PIKE: Before calling the witness to the stand, I would like to enter a plea of once in jeopardy and once convicted and I have that plea with me in writing.

THE COURT: Please show it to the District Attorney.

Have you been apprised of it?

MR. MILULCICH: No, your Honor.

MR. PIKE: The matter has been to the Court of Appeals. It was rejected there. A writ of habeas corpus.

MR. MILULCICH: The defendant was certified as an adult from the juvenile court and this is the basis of counsel's motion that he has, in fact, been in jeopardy.

THE COURT: Has that issue been tried on the writ of habeas corpus?

MR. PIKE: That is correct. We are in the court of the State of California, but in order to preserve the record I again raise the plea and I would like to file a written plea.

THE COURT: All right.

MR. PIKE: It has been attached to a certified copy of the court's ruling in the juvenile court of which this matter was previously tried.

MR. MILULCICH: If I am not mistaken, the procedure would be for the defendant, in effect, to withdraw his plea of guilty if there has been one.

THE COURT: There hasn't been any plea entered.

Let's go off the record.

(Whereupon a discussion was held off the record.)

THE COURT: Back on the record. On the same questions of facts, then the plea is rejected, proceed with the preliminary hearing.

JAMES THOMAS MATTERA,

called as a witness by and on behalf of the People, being first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: James Thomas Mattera.

DIRECT EXAMINATION

BY MR. MILULCICH:

Q Where do you live?

A 4030 West 164th Street.

Q And is your telephone number there 370-3002?

A Yes.

Q Where do you work?

A I work at the Lawndale Liquor Store, 16201 Hawthorne Boulevard in the City of Lawndale.

Q Were you working at that location on or before February, 1971?

A Yes, I was.

Q At approximately 10:45 p.m., did something unusual occur?

A Yes. I was robbed.

MR. PIKE: Move that be stricken as a conclusion of the witness.

THE COURT: It will be stricken.

Tell us what happened, what you observed and what you saw.

THE WITNESS: Well, I was working. One customer was at the counter and two people came in and walked in the back of the store and waited until I finished with this customer, and they came up with a ten cent bag of potato chips and they pulled guns and said, "Back up against the wall."

BY MR. MILULCICH:

Q Either one of those persons in the courtroom today?

A Yes, he is.

Q Point him out, please.

A The guy on the left.

THE COURT: Indicating the defendant.

BY MR. MILULCICH:

Q What happened after the guns were pulled?

A He said, "Back against the wall," and I did, and he, the defendant or the guy right there, reached up and picked up the whole cash box and handed it over to the other guy.

Q And then what happened?

A And then I told him—I asked him if he would leave the box and he said that he didn't have time and he stayed in the front.

THE COURT: Which one is the one in the front, the defendant?

THE WITNESS: The defendant stayed while the other person walked out and he followed him.

THE COURT: And then they left?

THE WITNESS: Right.

MR. MILULCICH: I have what appears to be a shopping bag along with some number attached thereto.

May I have these items marked as People's 1 for identification?

THE COURT: It may be so marked.

MR. MILULCICH: May I approach the witness?

THE COURT: You may.

MR. MILULCICH: May the record reflect I am now opening this bag and exposing the contents therein which appears to be a box or a cash register and two guns and I am showing them to the witness.

Sir, I show you these items presently before you previously marked as People's 1 for identification.

Do these items appear at all familiar to you?

A This looks like the box.

THE COURT: Indicating the cash drawer?

THE WITNESS: That looks like one of the guns.

THE COURT: Referring to a .38 Smith and Wesson with a short barrel, one inch barrel, apparently.

Do you see the other gun there?

THE WITNESS: Yes.

THE COURT: Do you recall seeing that before?

THE WITNESS: I just remember the brown handle.

THE COURT: Where did you see this one, the one inch Smith and Wesson with the brown handle?

THE WITNESS: I couldn't state positively which person had it. I just know that one had a brown handle and one of those two persons had it.

BY MR. MILULCICH:

Q I show you what appears to be kind of a blue wool-type cap that I have removed from People's 1 for identification.

I ask you to look at that and tell me if that appears at all familiar to you.

A At the time both of them had one on.

Q They had this type of a cap on?

A Yes, they tucked it up.

MR. MILULCICH: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. PIKE:

Q Mr. Mattera, that brown handled gun, the only thing you recognize is that it has a brown handle; is that correct?

A Yes.

Q Are there any marks on the cash drawer that is before you that was contained in People's 1 that helps you identify the cash drawer that came from your store?

A No.

THE COURT: IT just looks like it; it resembles it?

THE WITNESS: Yes.

BY MR. PIKE:

Q Prior to your testifying here today, on how many occasions after the event that you have testified to on February the 8th or between February the 8th and today, how many times have you seen the defendant?

A I really couldn't say. I have seen him because I had to go downtown—

THE COURT: How many times between the date of this incident at the liquor store and today, how many times, if you can remember seeing him?

THE WITNESS: I know for sure at least once.

THE COURT: At least once?

THE WITNESS: Yes.

BY MR. PIKE:

Q Didn't you see a photograph of this defendant?

A The day after.

Q Where was that that you saw the photograph?

A I was at the store and the two detectives or police officers came in with the pictures.

Q How many pictures did the detectives have for you?

A I couldn't tell; it was more than one.

Q More than three?

A Yes, there was.

Q How many pictures did you recognize that were in that group that was brought to you?

A One.

Q And were all of those pictures of black men?

A Yes, they were.

Q They were all mug shots; that would be a profile and a name would appear? It would be an official photograph taken by the police.

A I can't remember.

Q You testified you saw this defendant at one other time. Where was it that you saw him?

A It was downtown in some court. I got subpenaed.

Q It was in a court?

A Yes.

Q Did you testify in that court?

A Yes, I did.

Q Did you identify the defendant in that court?

A Yes, I did.

Q Do you know what the outcome of that appearance in court was?

A No, I don't.

Q Were you excluded from the courtroom during the time the testimony was taken?

A As I gave my testimony.

Q Prior to the time you gave your testimony were you excluded when anyone else gave their testimony?

A Yes, I think so.

MR. PIKE: No further questions.

THE COURT: Anything further?

You may stand down.

MR. MILULCICH: The People call Officer Gomez.

THE COURT: You are going to put on the full-blown case?

MR. MILULCICH: No, your Honor.

FRANKLIN GOMEZ,

called as a witness by and on behalf of the People, being first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your full name, please.

THE WITNESS: Franklin Gomez. G-o-m-e-z.

DIRECT EXAMINATION

BY MR. MILULCICH:

Q Deputy Gomez, what is your present occupation and assignment?

A Deputy Sheriff for the County of Los Angeles, currently assigned to Administrative Services.

Q Were you so employed and so assigned on February 8, 1971?

A Yes, I was.

Q Did you have—did you have occasion to receive a call over your police radio unit as to an armed robbery?

A Yes, I did.

Q What information was given to you?

A The information was there was an armed robbery at 16201 Hawthorne Boulevard, the Lawndale Liquor Store perpetrated by two male Negroes with a third suspect driving the car that the suspects left in.

The vehicle was described as a possible 1960 to 1963 General Motors product, either an Oldsmobile or a Pontiac, brown-and-white in color. That one of the taillights was inoperative.

Q Did you subsequently observe a vehicle matching this description?

A Yes, I did.

Q Where was it?

A The vehicle was eastbound on El Segundo Boulevard approaching Central Avenue.

Q Approximately what time was that?

A Approximately 23:10 or 11:10.

Q Did you happen to stop that vehicle?

A Yes, we did.

Q Did you observe anything inside this vehicle?

A Yes.

Q Drawing your attention to the items previously marked People's 1 for identification, I ask you to look at them and tell me if you can recognize any of those items?

A Yes, I do.

Q Which items do you recognize and can you tell us where you first saw them.

A I recognize all of the items, the cash box with the guns. There was also some currency and change and the caps were found in the front seat on the floorboard between the front passenger's seat.

Q Do you recognize any person that was in the vehicle at the time you stopped them?

A Yes, I do.

Q Is that person in the courtroom?

A Yes.

Q Will you point him out?

A Yes. He is the person sitting at my far left.

THE COURT: Indicating the defendant.

BY MR. MILULCICH:

Q Where was he seated when you first observed this vehicle?

A He was in the right, rear passenger seat.

MR. MILULCICH: Thank you. Nothing further.

MR. PIKE: No further questions.

THE COURT: You may stand down.

MR. MILULCICH: At this time the People offer People's 1 for identification into evidence.

MR. PIKE: No objection.

THE COURT: Any defense at this time?

MR. PIKE: No, your Honor.

THE COURT: It appearing to me that the offense in the within complaint mentioned to wit, violation of Section 211 of the Penal Code, robbery, a felony, was committed and there is sufficient cause to believe that the within named defendant committed the same. That he will be held to answer to the same. That he appear for arraignment in Torrance Southwest J on September 7, 1971, at 9:00 a.m.

Bail to stand in the amount heretofore fixed.

[Certification of reporter omitted in printing].

EXHIBIT L—INFORMATION.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, v. Gary Stephen Jones, Defendant. No. A-174204. Robbery (Sec. 211 P.C.).

INFORMATION

The said Gary Stephen Jones is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Robbery, in violation of Section 211, Penal Code of California, a felony, committed as follows: that the said Gary Stephen Jones on or about the 8th day of February, 1971, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take personal property from the person, possession and immediate presence of James Thomas Mattera.

That at the time of the commission of the above offense, said defendant, Gary Stephen Jones, was armed with a deadly weapon, to wit, a pistol.

JOSEPH P. BUSCH, JR.
District Attorney for the County of
Los Angeles, State of California

By JOHN M PROVENZANO, Deputy

EXHIBIT M—SUPERIOR COURT MINUTE ORDER, SEPTEMBER 29, 1971.

Superior Court of California, County of Los Angeles. Dept. SWJ.

Date: Sept. 29, 1971.

Honorable: Auten F. Bush, Judge.

J. Tabb, Deputy Sheriff.

W. Powell, Deputy Clerk.

N. Devereaux, Reporter.

People of the State of California vs. Jones, Gary Stephen. 603 C A 174204.

Counsel for Plaintiff: Joseph P. Busch, Jr., by I. Bloom, Deputy.

Counsel for Defendant: D. Pike.

Nature of Proceedings: Trial (Submission on Transcript) Trans from SW F.

The defendant personally and all counsel waive trial by jury.

Cause Called for Trial.

By stipulation of defendant and all counsel cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that all exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this court's rulings. The defendant personally waives his right to confrontation

of witnesses for the purpose of further cross-examination.

The Court states it has read and considered the transcript of the preliminary hearing.

Argument waived, cause submitted.

The Court finds the defendant guilty as charged to 211 P.C., degree fixed as first.

Defendant waives time for sentence. Referred to probation department and further proceedings continued to 10-20-71 in Dept. SWJ at 9 A.M.

Remanded.

EXHIBIT N—SUPERIOR COURT MINUTE ORDER, OCTOBER 20, 1971.

Superior Court of California, County of Los Angeles. Dept. SWJ.

Date: October 20, 1971.

Honorable: Auten Bush, Judge.

J. Tabb, Deputy Sheriff.

W. Powell, Deputy Clerk.

N. Devereaux, Reporter.

People of the State of California, vs. Jones, Gary Stephen. A174204. X-511939.

Counsel for Plaintiff: Joseph P. Busch, Jr., District Atty. by I. Bloom, Deputy.

Counsel for Defendant: D. Pike.

Nature of Proceedings: Probation and Sentence.

Probation denied. Sentenced as shown below.

Committed to the California Youth Authority.

Remanded.

EXHIBIT O—SUPERIOR COURT JUDGMENT OF CONVICTION AND COMMITMENT TO YOUTH AUTHORITY.

Superior Court of the State of California, for the County of Los Angeles. Dept. Southwest J.

Date: October 20, 1971.

Honorable: Auten Bush, Judge.

J. Tabb, Deputy Sheriff.

W. Powell, Deputy Clerk.

N. Devereaux, Reporter.

People of the State of California vs. Jones, Gary Stephen. A174204. X-511939.

Counsel for Plaintiff: Joseph P. Busch, Jr., District Atty., by I. Bloom, Deputy.

Counsel for Defendant: D. Pike.

Nature of Proceedings: Probation and Sentence.
Probation is denied.

Whereas the said defendant having been duly found guilty of the crime of Robbery (Sec. 211. P.C.), a felony, as charged in the information, which the Court found to be Robbery of the first degree committed in Los Angeles County, on or about the 8th day of February, 1971 and it appearing that the defendant was under the age of 21 years at the time of apprehension on the 8th day of February, 1971, to-wit: the age of seventeen (17) years, born on the 22nd day of June, 1953.

It Is Therefore Ordered, Adjudged and Decreed that said defendant be committed to the Youth Authority of the State of California for the term prescribed by law.

It Is Further Ordered that the defendant be remanded to the custody of the Sheriff of Los Angeles County to be held in custody in the County Jail under the jurisdiction of the Youth Authority of the State of California, subject to any orders the Authority may issue.

This Minute Order Was Entered
Oct. 21, 1971

WILLIAM G. SHARP, County Clerk
and Clerk of the Superior Court.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS.

DONALD W. PIKE
424 South Beverly Drive
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90212
Tel: (213) 553-8533

PETER BULL

ROBERT L. WALKER
Youth Law Center
795 Turk Street
San Francisco, California 94102
Tel: (415) 474-5865
Attorneys for Petitioner

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907-LTL.

Filed: Dec. 10, 1971.

POINTS AND AUTHORITIES
IN SUPPORT OF RELATOR'S
PETITION FOR A WRIT OF
HABEAS CORPUS

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I. INTRODUCTION AND STATEMENT OF FACTS.

It is scarcely possible to imagine a procedure more directly at odds with the clear language and fundamental policies of the double jeopardy clause than that to which Gary Steven Jones has been subjected. On March 1, 1971 he was adjudicated by the Juvenile Court of Los Angeles County to be a person described by Section 602 of the California Welfare and Institutions Code [hereinafter cited as "Cal. W&I Code"]. This determination was reached after the juvenile court

referee heard testimony, including testimony of the minor, and the court explicitly sustained the petition [the findings and order of Referee Barnett are annexed to relator's petition as Exhibit "E"].[1]

Instead of holding a dispositional hearing the court held a hearing pursuant to Cal. W&I Code § 707 to determine if the minor would be "amenable to the care, treatment and training program available through the facilities of the juvenile court. . . ."[2] The court found that the minor was not a proper subject for treatment under the Juvenile Court Law and directed that he be tried again in adult court.

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[1]Proceedings under the Juvenile Court Law are bifurcated. Since there are no provisions for bail, the juvenile court is required to hold a detention hearing within one judicial day after a petition is filed. The purpose of the hearing is to determine whether the minor should be detained or released pending his jurisdictional hearing. Cal. W&I Code §§ 632, 635, 636. With the exception of the minor's right to a jury trial, the jurisdictional hearing is identical to a criminal trial [*In re Winship,* 397 U.S. 358 (1970)]. The purpose of the proceeding is for the juvenile court to determine if the minor has committed the act or acts which allegedly bring him within the jurisdiction of the juvenile court. Cal. W&I Code § 701.

If the juvenile court finds that the minor is a person described by Section 602 of the Cal. W&I Code, it will hold a dispositional hearing which serves the same function as a sentencing proceeding in a criminal case. This hearing will normally be held a number of days after the jurisdictional hearing so that the probation officer will have sufficient time to provide the court with an up-to-date social studies report. Cal. W&I Code, § 702. Dispositional alternatives include varying kinds of probation, commitment to a juvenile home, ranch, or camp, or commitment to the California Youth Authority. Cal. W&I Code §§ 727, 730, 731.

[2]In its entirety Cal. W&I Code § 707 provides:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

The Court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

Petitioner was subsequently tried in connection with the identical incident for which he had been found a person coming within the Juvenile Court Law. He was convicted of having committed armed robbery in violation of Cal. Penal Code § 211 and committed to the California Youth Authority.[3] At each stage of the proceedings petitioner's court-appointed counsel has scrupulously objected that the procedure outlined above constituted double jeopardy in violation of the minor's constitutional rights.

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[3]The minute orders of the Superior Court have been annexed to relator's petition as Exhibits "M" and "N".

II. PETITIONER WAS TWICE PLACED IN JEOPARDY IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner has been compelled to undergo two trials, one in juvenile court and one in adult court, based upon the same underlying incident. During each proceeding he was "in jeopardy" because an unfavorable adjudication would subject him to loss of liberty for an extended period of time. See Cal. W&I Code §§ 727, 731; Cal. Penal Code § 213; see *In re Gault*, 387 U.S. 1 (1967). If petitioner had been tried twice as an adult based upon the same underlying facts, no one would dispute that he was being placed in double jeopardy.[4] See, *e.g.*, *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the double jeopardy guarantee is enforceable against the states through the Fourteenth Amendment. Yet, merely because the initial proceeding was conducted in juvenile court, the state courts have sustained this anomalous procedure without, however, articulating a defensible rationale. In fact, Judge Freeman, the Presiding Judge of the Los Angeles Juvenile Court, revealed his personal doubts regarding its constitutionality, although he felt compelled by California appellate decisions to deny petitioner's writ.

> "I have considerable doubts about the constitutionality. . . . I think you [counsel] have pointed up enough so it would make one wonder whether the juvenile is not now, in the terms of *Gault*, again being treated worse than the adult. The fact that it is not double jeopardy according to appellate cases does in a sense mean that the juvenile is treated worse than an adult. The adult never has to go through these two proceedings."[5]

[4]We assume of course, that there was no reversal on appeal or other contingency not applicable here.

It is well-established that jeopardy attaches in a non-jury trial no later than when the first witness is sworn. *United States v. Jorn*, 27 L.Ed.2d 543 (1971); *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *Richard M. v. Superior Court*, 4 Cal. 3d 370, 93 Cal. 752 (1971). On the other hand, Cal. W&I Code § 707 authorizes the transfer of a case from juvenile court to adult court, and the commencement of criminal proceedings at any time during the jurisdictional hearing.[6] Since this statute authorizes a second prosecution for the same underlying offense after jeopardy has already attached at the initial proceeding, it is in fatal conflict with the constitutional prohibition against twice placing a person in jeopardy. This procedure, sanctioned by Cal. W&I Code § 707 and utilized in the present case, is precisely the type of practice which the double jeopardy guarantee was intended to prevent. See *United States v. Ball*, 163 U.S. 662, 669 (1896); *Ex Parte Lange*, 18 Wall. 163, 21 L.Ed. 872, 877 (1874); *United States v. Sabella*, 272 F.2d 206 (2d Cir. 1959).[7]

[5]Reporter's Transcript, April 1, 1971, p. 15 [Exhibit "H"].

[6]See footnote 2; *supra*.

[7]The constitutionality of Cal. W&I Code § 707 is ripe for decision before this Court. The California Court of Appeal specifically upheld the constitutionality of the procedure encompassed by Section 707 in denying the writ below. *In re Gary Steven J.*, 17 Cal. App. 3d 704 at 709-10. Although the Supreme Court of California's denial of a hearing does not indicate agreement with all of the reasoning contained in the intermediate appellate court's opinion, it may "be taken as an approval of the conclusion there reached." See *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450, 453 n.3 (1955); *DiGenova v. State Board of Education*, 57 Cal.2d 167, 367 P.2d 865 (1962). Therefore, both an intermediate appellate court and the highest court in California have either explicitly or implicitly upheld Cal. W&I Code § 707 against a constitutional attack.

The purpose underlying the double jeopardy clause is to prevent the State, with all of its resources and power, from making repeated attempts to convict an individual. The double jeopardy clause is intended to protect the individual from the anxiety, embarrassment, expense, and ordeal of a second trial. *Green v. United States*, 355 U.S. 184, 188 (1957). In language particularly appropriate to the case at bar, the Supreme Court has stated,

> "The protection is not, as the court below held, against the peril of second punishment but against being tried twice for the same offense." *Kepner v. United States*, 195 U.S. 100, 130 (1904).

Trial of Gary in adult court upon the identical facts already adjudicated in juvenile court is clearly barred by this principle. It is constitutionally immaterial whether either or both adjudications resulted in conviction or acquittal.

> ". . . the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *United States v. Ball*, 163 U.S. 662, 669 (1896). Accord, *Helvering v. Mitchell*, 303 U.S. 391, 398 (1938); *In re Nielson*, 131 U.S. 176 (1889); *Richard M. v. Superior Court*, 4 Cal. 3d 370, 376; 93 Cal. Rptr. 752, 756 (1971).[8]

There is one federal district court decision which squarely examined the procedure before this Court and found it to be constitutionally inadequate. *United States v. Dickerson*, 168 F. Supp. 889 (D.D.C. 1958), *reversed on other grounds*, 271 F.2d 487 (D.C. Cir. 1959). In *Dickerson* a minor entered a guilty plea in juvenile court and was found by the court to be a delinquent child. As in the present case, the Juvenile Court attempted to transfer jurisdiction to the adult court after the jurisdictional hearing had terminated. Since jeopardy had attached, the court held that waiver of jurisdiction was impermissible.

> "This result in no way interferes with the statutory authority of the Juvenile Court to waive jurisdiction to the District Court in certain cases. The waiver of jurisdiction, however, must take place before jeopardy attaches. It may be exercised either after a preliminary hearing, or after an *ex parte* investigation, but may not occur after the defendant has pleaded guilty and his plea was accepted, or after the case has been tried or the trial has been started in Juvenile Court. The mere fact that different terminology is used in the Juvenile Court in a commendable and humane effort to disassociate its activities from the atmosphere of a criminal tribunal does not affect these conclusions. We must not be misled by names or terms, but must be guided by juristic concepts to which the names or terms are attached. *Id.* at 903.[9]

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[8]"The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, *whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.*" (Emphasis supplied.) *Ex Parte Lange*, 18 Wall. 163, 21 L.Ed. 872, 877 (1874).

[9]The Court of Appeals for the District of Columbia Circuit overruled this decision in part because, in its view, the District Court had erred in applying procedural safeguards observed in criminal proceedings to the juvenile court. This basis of the court's reversal would appear to be impliedly overruled by *In re Winship*, 397 U.S. 358 (1970); and *In re Gault*, 387 U.S. 1 (1967). In addition, the Court of Appeals felt that in waiving the minor to adult court, the juvenile court judge had implicitly rejected his guilty plea [*United States v. Dickerson*, 271 F.2d 487, n. 9 at 491 (1959)], a ground clearly not pertinent to the present case.

The facts in *Dickerson* are identical to the case at bar except for the insignificant difference that Gary was adjudicated a delinquent after a jurisdictional hearing, whereas Dickerson had entered a plea of guilty. Since jeopardy had attached in both cases, subsequent prosecution of either minor for the same offense for which he had previously been found a delinquent child would be barred.

The California Court of Appeal, Second Appellate District, rejected petitioner's double jeopardy argument below in an opinion in which the Court commented,

> ". . . while it is true that . . . jeopardy had attached once the first witness had testified at the 701 [jurisdictional] hearing, no new jeopardy had arisen by the proceeding sending the case to the criminal court. The entire juvenile court law contemplates a careful determination, on a case-by-case basis (citations omitted), as to the type of procedure most likely to protect society and to rehabilitate the minor. Under some circumstances, a minor will go from criminal court to the juvenile court; in other cases he will go from the juvenile court to the criminal court. But, until one court or the other reaches a final disposition of the case, only a single jeopardy is involved." 17 Cal.App.3d 704 at 710; Appendix "C".

This reasoning, we submit, reflects an attitude towards juvenile court proceedings which the Supreme Court decisively repudiated in *In re Winship*, 397 U.S. 358 (1970), when it said,

> ". . . civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court . . ." *Id.* at 366.

If the protection afforded by the double jeopardy clause of the Fifth Amendment is applicable to juvenile proceedings—and this was the assumption of the California Court of Appeal—it is beside the point either that the juvenile court is seeking to rehabilitate those minors falling within its jurisdiction or that Cal. W&I Code § 707 provides a mechanism by which the court transfers those minors over age 16 whom it believes it cannot rehabilitate to adult court.

The immutable fact remains that under Cal. W&I Code § 707 minors like Gary Steven Jones are compelled to undergo two trials for the same offense. It is patently erroneous to perceive the jurisdictional hearing in juvenile court, as did the Court of Appeal, as merely prefatory to the later criminal proceeding.[10] Under Cal. W&I Code § 602 the jurisdictional hearing is a fullblown trial at which the district attorney must establish beyond a reasonable doubt [*In re Winship*, 397 U.S. 358 (1970)] the minor's guilt. The sole issue before the juvenile court during the jurisdictional hearing was whether the district attorney had established that Gary had committed a robbery under Cal. Penal Code § 211. The court's jurisdictional finding exposed Gary to institutionalization until age 21 [Cal. W&I Code § 607], and at no time during the jurisdictional hearing was Gary's suitability for treatment be-

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[10]There is no requirement under the Juvenile Court Law by which the jurisdictional hearing must precede the Section 707 [transfer of jurisdiction] hearing. The two factors which the juvenile court *must* consider in determining whether to waive jurisdiction are the minor's past record of delinquency and his behavior pattern as described in the probation officer's report. *Jimmy H. v. Superior Court*, 3 Cal.3d 709, 714; 91 Cal.Rptr. 600 (1970). These two factors may obviously be explored at a hearing conducted prior to the time jeopardy attaches at the jurisdictional hearing.

fore the Court. Unless benign motives and *post hoc* reasoning are to overshadow reality, the constitutional prohibition cannot be avoided merely because of the label affixed to the proceeding.

> "Precise constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings." *United States v. Dickerson,* 168 F.Supp. 899, 902 (D.D.C. 1958), *rev'd. on other grounds,* 271 F.2d 487 (D.C.Cir. 1959).

Nor may the double jeopardy protection be applied with any less vigor because the two proceedings which the minor is forced to endure will take place in different courts. This is the "dual sovereignty" theory under which double prosecutions for the same offense in state and local courts were formerly permitted. This fictional basis for duplicate prosecutions was laid to rest in *Waller v. Florida,* 397 U.S. 387, 440 (1970), where the Court held,

> ". . . a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy . . ."

Although we believe that Cal. W&I Code § 707 is unconstitutional, we are not asserting that California is powerless to provide a procedure by which the most incorrigible juveniles may be transferred to adult court for prosecution. The question is not whether a determination to waive a minor to adult court should ever be made, but merely *when* it is to be made. There is no reason to believe that in most cases such a determination could not be reached at the detention hearing or at a special waiver hearing conducted prior to the inception of the adjudicatory proceeding. As the presiding Judge of the Los Angeles Juvenile Court noted in denying relator's petition for a writ of habeas corpus,

> ". . . I don't think that the Juvenile Court would be crippled if there were no 707 as it is now constituted, that is, I don't know our operation would really be hampered if the rule were laid down that at the arraignment or detention hearing or in any event before the introduction of evidence at the adjudication the court may set the matter for a fitness hearing." (RT 18).[11]

Unlike Cal. W&I Code section 707, recent draft and model statutes have stressed that a determination to transfer a juvenile to adult court must be made prior to the commencement of adjudicatory proceedings. Thus, Section 34(a) of the third tentative draft [May, 1968] of the Uniform Juvenile Court Act, prepared by the American Bar Association National Institute provides:

> "After a petition has been filed charging delinquency based on conduct which is designated a public offense under the laws, including local ordinances, of this state, the court may, *before hearing the petition on its merits,* transfer the offense for criminal prosecution to the appropriate court having jurisdiction of the offense. . . ." (Emphasis supplied.) See also Rule 9, *Model Rules of Juvenile Courts* (N.C.C.D. 1968).

As these commentators have made clear, contemporary constitutional standards demand that the waiver decision be reached before jeopardy has attached at the jurisdictional hearing.

A different rule would have the impermissible effect of creating divergent double jeopardy standards for

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[11]Exhibit "H", p. 18.

adults and juveniles. There is no constitutional justification for holding that jeopardy attaches in adult proceedings when the first witness is sworn [*United States v. Jorn*, 27 L.Ed.2d 543 (1971)], while concomitantly holding that a minor who has testified in a juvenile proceeding and who has been adjudicated a delinquent, is not placed in double jeopardy at his subsequent criminal trial for the same underlying offense. Since this is what transpired in the present case, this Court must reject the conclusion of the California Court of Appeal and hold that petitioner has been twice placed in jeopardy in violation of his rights under the Fifth Amendment.

III. THE GUARANTEE AGAINST TWICE BEING PLACED IN JEOPARDY AFFORDED BY THE FEDERAL CONSTITUTION IS APPLICABLE TO JUVENILE DELINQUENCY PROCEEDINGS.

This writ presents an issue of first impression in this Court and in the Ninth Circuit—whether the protection afforded by the double jeopardy clause of the Fifth Amendment is applicable to proceedings in juvenile court under California W&I Code Section 602. If, as petitioner contends, the double jeopardy clause does apply to delinquency proceedings, petitioner was placed in jeopardy during the jurisdictional hearing in juvenile court, and his subsequent prosecution in adult court was unlawful.

The Supreme Court of California has recently confronted this issue and held that the double jeopardy provisions of both federal and state Constitutions are applicable to proceedings under Section 602 of the Juvenile Court Law. *Richard M. v. Superior Court*, 4

Cal.3d 370, 93 Cal.Rptr. 752 (1971). There is a scarcity of other authority on this issue, but such authority as does exist supports the proposition that minors in juvenile delinquency proceedings are protected by the double jeopardy clause. *United States v. Dickerson*, 168 F.Supp. 899, 902 (D.D.C. 1958); *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959); *Tolliver v. Judges of the Family Court*, 59 Misc.2d 104 (N.Y. Fam.Ct. 1969); *Anonymous v. Superior Court*, 10 Ariz. App. 956, 959; 457 P.2d 956 (1969) [". . . we accept, without deciding, that in this post-*Gault* era, the Double Jeopardy clause applies to juvenile proceedings . . ."]; *In re Holmes*, 379 Pa. 599, 109 A.2d 523, 526 (S.Ct. of Pa. 1954) (dictum). A number of state and federal court decisions in Texas have held that it is a deprivation of fundamental fairness and due process of law to convict a defendant in adult court based upon the same act for which he had been adjudged a delinquent in juvenile court. *Hutlin v. Beto*, 396 F.2d 216 (5th Cir. 1968); *Sawyer v. Hauck*, 245 F.Supp. 55 (W.D.Tex. 1965); *Garza v. State*, 369 S.W.2d 36 (Tex.Cr.App. 1963). Although these decisions were founded upon the due process clause of the Fourteenth Amendment, rather than the double jeopardy clause of the Fifth Amendment, it must be recalled that under *Palko v. Connecticut*, 302 U.S. 319 (1937), the double jeopardy clause was not considered to be applicable against the states. These cases were decided under the *Palko* rule which was not overturned as regards the double jeopardy prohibition until the Supreme Court decided *Benton v. Maryland*, 395 U.S. 785 (1969).

Nevertheless, in *Collins v. State*, 429 S.W. 2d 650 (Tex.Civ.App. 1968), the court foreshadowed Benton in holding that a second juvenile court proceeding on

the same facts was barred on double jeopardy grounds, despite a previous nonsuit. In view of this decision, it seems likely that previous decisions by federal and state tribunals in Texas have been heavily based upon notions of double jeopardy, although at that time, the courts chose due process as the purported basis for their decisions because they considered themselves bound by *Palko*.

The language of the double jeopardy clause applies to all persons without exception; it draws no distinctions between adults and minors:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."
>
> U.S. Const., Amend. V.

The plea of *autrefois convict* was known at early common law[12] and is one of the most deeply ingrained in our Anglo-American system of jurisprudence. *Green v. United States,* 355 U.S. 184, 188 (1957). So firmly entrenched is this principle that every state constitution contains a provision prohibiting double jeopardy. Sigler, *Double Jeopardy,* 34 (1969). Indicative of the importance attached to this protection is the fact that the Supreme Court has ruled that its decision in *Benton v. Maryland,* 395 U.S. 784 (1969), making the double jeopardy clause enforceable against the states, is fully retroactive. *Ashe v. Swenson,* 397 U.S. 436, 437, fn. 1 (1970). In view of the importance attached to this monumental bulwark of liberty, it would indeed be

[12]". . . the plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be . . . is a good plea in bar to an indictment." *Blackstone's Commentaries,* Vol. II, Section 379, p. 2571 (Jones Ed. 1916).

surprising if the protection it affords were available to hardened criminals but not to children. Compare *In re Gault,* 387 U.S. 1, 47 (1967).

In several decisions the United States Supreme Court has applied various provisions of the Bill or Rights to juvenile delinquency proceedings. The Court has held that a minor at such a proceeding is entitled to adequate notice of the charges against him, representation by counsel, the right not to incriminate himself, and the right to confront and cross-examine witnesses [*In re Gault,* 387 U.S. 1 (1967)], as well as the right to be tried in accordance with a reasonable doubt standard of proof [*In re Winship,* 397 U.S. 358 (1970)]. In an earlier decision the Court had held that in a transfer of jurisdiction hearing such as the one in the present case, the minor is entitled to a hearing, representation by counsel, and a statement of reasons or considerations; and counsel is entitled to review the child's social studies records. *Kent v. United States,* 383 U.S. 541 (1966).[13]

The principle which emerges from these decisions is that in the absence of strong, contervailing considerations the provisions of the Bill of Rights will be applied to delinquency proceedings in juvenile court. In *Winship* particularly the Court placed the burden on the state to demonstrate that the application of criminal safeguards would harm particular beneficial aspects of

[13]Counsel was already required under a District of Columbia statute. Although it is by no means clear, the requirements of some kind of hearing and findings of fact seem to have rested upon a due process foundation. See especially 383 U.S. at 561. The Supreme Court of California has read *Kent* to be a constitutional ruling insofar as it requires appointment of counsel at transfer of jurisdiction hearings. *In re Harris,* 67 Cal.2d 76, 64 Cal.Rptr. 319, 321 (1967).

the juvenile judicial process. See The *Supreme Court, 1969 Term,* 84 Harv.L.Rev. 1, 160 (1969). Bill of Rights safeguards which are not inconsistent with the philosophy and practices of the juvenile court will be required because a minor in a delinquency proceeding will be "subjected to the loss of his liberty for years" and because such a proceeding is "comparable in seriousness to a felony prosecution." *In re Gault,* 387 U.S. 1 at 33 (1967).

Last term the Court held that minors in delinquency proceedings do not possess a federal, constitutional right to a trial by jury. *McKiever v. Pennsylvania,* .... U.S. ...., 29 L.Ed.2d 647 (1971). Although the result was different, this decision was no more than an application of those principles already adumbrated in *Kent, Gault,* and *Winship, supra.* The Court found that imposition of the jury trial requirement would destroy this distinctive quality of the juvenile court system.

> "If the jury trial were to be injected into the juvenile court system, it would bring with it into that system the traditional delay, the formality and the clamor of the adversary system and, possibly, the public trial." 29 L.Ed.2d at 663.

Unlike the jury trial requirement, application of the double jeopardy safeguard would not radically affect the juvenile court process. In fact, it would not affect at all the *nature* of either the jurisdictional hearing, or the waiver of jurisdiction hearing under Cal. W&I Code Section 707. The sole difference would be that the juvenile court would be required to hold a Section 707 hearing prior to the time that jeopardy attached at the jurisdictional hearing, a result which is recommended in both the Uniform Juvenile Court Act and the National Council on Crime and Delinquency's *Model Rules*

for Juvenile Court,[14] and which the Presiding Judge of the Los Angeles Juvenile Court has indicated would not hamper his Court's operation.[15]

Imposition of the double jeopardy guarantee is fully in keeping with the philosophy and practices of the juvenile court. It will not increase the formality of the process or introduce unnecessary delays. Quite to the contrary, it will expedite the time when a decision must be made as to whether a minor will be dealt with as a juvenile or transferred to adult court, thereby relieving some of the anxiety which is both counterproductive to rehabilitation of the minor and which the double jeopardy clause is intended to prevent. See *Green v. United States,* 355 U.S. 184, 187-88 (1957).

By contrast, it is fundamentally unfair to expose the minor to a jurisdictional hearing when he does not know if he later will be subjected to a criminal prosecution for the same underlying offense. In this situation, it is impossible for counsel to reach an intelligent decision as to whether his client should testify, not knowing whether his client's testimony might later be used against him at the criminal trial. The present procedure turns every jurisdictional hearing into a potential preliminary hearing and deprives the juvenile court in many instances of the opportunity of hearing the minor's side of the case. Thus, the double jeopardy guarantee would actually be in keeping with the juvenile court's rehabilitative goal and help the court to effectuate its aim.[16]

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[14]See p. 13, *supra.*

[15]P. 12-13 *supra;* Exhibit "H" Appendix p. 62.

[16]Since the purpose of a Cal. W&I Code Section 707 hearing is to transfer jurisdiction to adult court for criminal prosecution, even more of the criminal safeguards should be available than at a juvenile court jurisdictional hearing.

In fact, the patent unfairness of exposing the minor to this uncertainty may destroy any realistic possibility for his rehabilitation. See *In re Gault*, 387 U.S. 1, 33 (1967), and articles and reports cited therein. It does not auger well for a system of juvenile justice to claim an exemption from a constitutional provision that would protect a juvenile from the anxiety and actuality of multiple prosecutions for the same underlying offense. The rehabilitative goals of the juvenile court process are neither consistent with nor enhanced by a method of proceeding deemed so basically repugnant when applied to adults.

IV. HABEAS CORPUS IS THE PROPER REMEDY.

Habeas corpus is the proper remedy by which one who is incarcerated may challenge the legality of the judgment pursuant to which he is confined. 28 U.S.C. Section 2241. Therefore, Gary Steven Jones may challenge by a writ of habeas corpus the lawfulness of the Superior Court judgment convicting him of robbery in the first degree and sentencing him to the California Youth Authority. If, as petitioner contends, he was twice placed in jeopardy by the juvenile court adjudication and adult court prosecution, his present confinement is illegal and he is entitled to be released and remanded to juvenile court. See *Peyton v. Rowe*, 391 U.S. 54 (1968), where one of the claims petitioners was permitted to raise by a petition for a writ of habeas corpus was that he had been twice placed in jeopardy for the same offense.

It makes no material difference that if this Court orders petitioner released from his present confinement, the Juvenile Court of Los Angeles County may subsequently restrain him of his liberty. *In re Bonner*,

151 U.S. 242 (1894) [habeas corpus lies to obtain petitioner's release from the prison to which he had been unlawfully sentenced without prejudice to his being sentenced to the appropriate prison]; *Velasquez v. Rhay*, 408 F.2d 9 (9th Cir. 1969) (per curiam); see *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) [The 1966 amendments to the habeas corpus statute, especially the new section 2244(b), contemplate the possibility of relief other than immediate release from physical custody]. These cases stand for the proposition that the custodial consequences of an unlawful conviction must be invalidated on a petition for a writ of habeas corpus even if the relator would remain in a different and valid custody upon his release. *Development—Federal Habeas Corpus*, 83 Harv.L.Rev. 1038, 1081 (1970). As the Supreme Court has stated in language equally appropriate to this case,

> "Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention. The petitioner is now serving a . . . If sentence imposed pursuant to a conviction . . . as he contends, that conviction was obtained in violation of the Constitution, then his confinement is unlawful. It is immaterial that *another* prison term might still await him even if he should successfully establish the unconstitutionality of his present imprisonment." (Emphasis in original.) *Walker v. Wainwright*, 390 U.S. 355, 336-37 (1968).

It is, of course, true that if petitioner is remanded to juvenile court, that court *might* commit him to the California Youth Authority to whose jurisdiction he is presently committed by the Superior Court. But this Court may not refuse issuance of a writ upon specula-

tion as to what disposition *could* be imposed by the juvenile court. While commitment to the California Youth Authority is an authorized disposition under the Juvenile Court Law (Cal. W&I Code Section 730), so are commitments to a juvenile home, ranch, or camp or some form of probation (Cal. W&I Code Section 725, 730, 731). At this juncture it is impossible to determine which alternative the juvenile court would choose. Moreover, the particular disposition chosen by the juvenile court does not alter the illegality of the commitment order of the Superior Court, which is what is being challenged by the petition for a writ of habeas corpus.

It is also clear that commitment to the California Youth Authority by an adult court involves a confinement of considerably longer duration than a comparable commitment by the Juvenile Court. Cal. W&I Code Section 1769 provides that every person committed to the Youth Authority by the juvenile court shall be discharged upon expiration of two years or his twenty-first birthday, whichever occurs later. But under Cal. W&I Code Section 1771 every person convicted of a felony[17] and committed to the Youth Authority shall be discharged when he reaches age twenty-five unless an order for further detention has been made. Thus, the difference in the potential duration

[17]Gary Steven Jones is clearly a convicted felon. Cal. Penal Code Section 17(a) provides, "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions." Under Cal. Penal Code Section 213 robbery is punishable by imprisonment in state prison for not less than five years. Since robbery in the first degree cannot be punished by a fine or imprisonment in county jail, it can never be considered a misdemeanor. Cal. Penal Code Section 17(b) *People v. Hannon*, 96 Cal.Rptr. 35 (1971).

of commitment in the present case (where petitioner was 18 years of age at sentencing) between the illegal adult court order and a lawfully imposed order of the juvenile court would be four years.

Petitioner would likewise suffer a number of disabilities from the adult court conviction which would not occur if he were merely a ward of the juvenile court. As a convicted felon his credibility could be impeached by evidence of his prior felony conviction. Cal. Evid. Code Section 788. His felony conviction would be grounds for denying him state employment [Cal. Gov. Code Section 18935(f)] or revoking it [Cal. Gov. Code Section 199].[18] In addition, while all juvenile court records are sealable under Cal. W&I Code Section 781, records of felonies tried in adult court are not sealable. See Penal Code Section 1203.45(a). The stigma attached to the subject of such records—even though a minor at the time of his offense—has been explicity recognized by the Supreme Court of California in *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 94 Cal. Rptr. 813 (1971). With a prior felony conviction on his record petitioner would be subject to a two-year minimum term in state prison if he is convicted of a felony in the future. Cal. Penal Code Section 3024(c). In addition, he may be subject to a finding of habitual criminality under Cal. Penal Code Section 644 which would greatly increase the minimum term he would have to serve on a future conviction before release on parole. Petitioner would not suffer such increased pun-

[18]It is also noteworthy that the Cal. Business and Professions Code lists thirty-six licensed occupations which subject licensees to disciplinary action upon conviction of a felony and/or a crime involving moral turpitude. C.E.B. *California Criminal Law Practice* Sections 25-28 (1969 ed); see also *Note*, 14 Stan.L.Rev. 533, 541 (1962).

ishment if his record indicated only that he had been a ward of the juvenile court.

Finally, and most significantly, a person committed to the California Youth Authority pursuant to a criminal conviction may be returned to the committing court if at any time that person appears to the Youth Authority,

> ". . . to be an improper person to be retained in any such institution or facility, or to be so incorrigible or so incapable of reformation under the discipline of the authority as to render his detention detrimental to the interests of the authority . . ." Cal. W&I Code Section 1737.1.

Under the same statute the youth may thereupon be sentenced to state prison for the term he could have received less the time he served at the Youth Authority. In the present case, Gary could be returned at any time to the Superior Court and sentenced to an indeterminate term of not less than five years in state prison. Cal. W & I Code Section 1737.1; Cal. Penal Code Section 213. As a ward of the juvenile court. Gary could never be sentenced to state prison even if the Youth Authority returned him to the juvenile court as unamenable to its rehabilitative processes. Cal. W&I Code Sections 1737.1. It is, therefore, abundantly apparent that a commitment to the California Youth Authority by the Superior Court carries far graver immediate and collateral consequences than a similar Juvenile Court commitment. The illegal Superior Court commitment order must be cognizable on a petition for a writ of habeas corpus. Compare *Sibron v. New York*, 390 U.S. 40, 51-55 (1968).

V. PETITIONER HAS EXHAUSTED HIS STATE COURT REMEDIES AS REQUIRED BY 28 U.S.C. SECTION 2254(b). REEXHAUSTION OF THESE REMEDIES WOULD BE INEFFECTIVE TO PROTECT HIS RIGHTS.

As noted in relator's petition and in the annexed affidavit of Donald W. Pike (Exhibit "A"), petitioner exhausted his state remedies by filing petitions for a writ of habeas corpus in the Superior Court of Los Angeles County and the California Court of Appeal, Second Appellate District, and, then, by filing a petition for hearing with the Supreme Court of California. All three courts turned petitioner down, the court of Appeal writing an opinion which indicated that it had met and rejected petitioner's double jeopardy claim on the merits. Since petitioner had exhausted his state court remedies case, it obviously would have been futile for him to have raised on appeal the identical double jeopardy claim before the same courts which had previously rejected it.

Under well-established California law denial of collateral relief on the merits is res judicata and forecloses appellate relief in the same court on the same issue. *People v. Medina*, 97 Cal.Rptr. 25 (1971). In the *Medina* case, the same court which denied Gary a writ of habeas corpus had denied a petition for a writ of mandate or prohibition raising the constitutionality of a search and seizure. When petitioner sought to raise the identical constitutional issue again on appeal, the court held that it was barred from granting relief by its previous denial of appellant's writ. *Id.* at 26. Since Gary's petition for a writ of habeas corpus was rejected on the merits, it is clear under the *Medina* decision that appellate relief would not have been available to him.

28 U.S.C. Section 2254(b) provides that a state prisoner's application for a writ of habeas corpus shall be denied unless it appears that,

> ". . . the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[19]

This requirement of exhaustion has been construed to mean that it is only necessary to exhaust state remedies once. *Brown v. Allen,* 344 U.S. 443 (1953); *Grundler v. North Carolina,* 283 F.2d 798, 800 (4th Cir. 1960). This is both because 28 U.S.C. Section 2254(b) refers only to "exhaustion" and nowhere mentions as a statutory requirement "reexhaustion" and because reexhaustion of the same constitutional claim already rejected would obviously be "ineffective to protect the rights of the prisoner." 28 U.S.C. Section 2254(b).

In *Schiers v. People,* 333 F.2d 173 (9th Cir. 1964), by way of example, the defendant unsuccessfully appealed his conviction but failed to pursue a state habeas corpus remedy which was theoretically available to him. The court stated,

> "Title 28 U.S.C. Section 2254, provides that a state prisoner's application for habeas corpus 'shall not be granted unless it appears that the applicant has exhausted the remedies available in the

[19]The Ninth Circuit has stated that this doctrine of exhaustion of state remedies is based on comity and is not jurisdictional. *O'Neil v. Nelson,* 422 F.2d 319, 323 (9th Cir. 1970).

> courts of the State . . .' This requires that 'constitutional issues arising out of state criminal prosecutions should be presented first to state courts' (Citation omitted). These issues, however, need only be presented once. (Citation omitted.)" *Id.* at 174.

And in *Evans v. Cunningham,* 335 F.2d 491 (4th Cir. 1964), the Court went even further in holding that relator Evans would not be required to exhaust his state remedies where co-defendant Sims' arguments on appeal had been rejected by the highest court in Virginia.

> "Under these circumstances, any competent lawyer would advise Evans that he was wasting his time if he undertook to persuade the Virginia Supreme Court of Appeals to reverse itself, unless he was armed with some fresh argument which Sims had not presented. Evans has none." *Id.* at 493.

There is no more reason to require Gary to reexhaust his state remedies through the state appellate process than there was to require petitioners in the above-cited cases to redundantly pursue their collateral remedies. As the aforementioned cases demonstrate, reexhaustion of state remedies is unnecessary where relator's arguments have been made and rejected on the merits. Although the exhaustion requirement has a sound basis, its purpose would be subverted by blind insistence that petitioner abortively seek an appellate remedy which in reality is illusory.

CONCLUSION

For the foregoing reasons a writ of habeas corpus should issue directing the release of Gary Steven Jones from his unlawful detention in the California Youth Authority institution in which he is presently confined, and remanding the minor to the Juvenile Court of Los Angeles County for disposition pursuant to that Court's previous finding that the minor was a person described by Cal. W&I Code Section 602.

Dated: December 2, 1971.

Respectfully submitted,

Peter Bull
Robert L. Walker
Donald W. Pike
By: /s/ Robert L. Walker
Robert L. Walker

DISTRICT COURT ORDER APPOINTING GUARDIAN AD LITEM.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Reception Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907-LTL.

ORDER APPOINTING GUARDIAN AD LITEM

Filed: Dec. 10, 1971.

Upon reading the petition for appointment of Guardian ad Litem, and it being deemed by the Court to be necessary and expedient, and good cause appearing therefor;

IT IS HEREBY ORDERED THAT:

LOLA MAE JONES be hereby appointed and constituted as the Guardian ad Litem of minor GARY STEVEN JONES for the purpose of initiating and maintaining the above-stated habeas corpus proceeding.

Dated: Dec. 10, 1971.

/s/ Albert Lee Stephens, Jr.

UNITED STATES DISTRICT JUDGE

DISTRICT COURT ORDER REQUIRING RESPONSE TO PETITION.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil No. 71-2907-LTL.

ORDER REQUIRING RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Filed: Dec. 20, 1971.

In this action, petitioner has filed a petition for writ of habeas corpus. He is a minor in the custody of the California Youth Authority.

IT IS ORDERED that respondents serve and file their response to the petition within a period of fifteen days hereafter, unless time is extended by the Court for good cause shown.

Dated: December 17, 1971.

/s/ Lawrence T. Lydick

Lawrence T. Lydick

United States District Judge

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil No. 71-2907-LTL.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS PETITIONER'S CONTENTION

Filed: Jan. 10, 1972.

Petitioner's sole contention is that his trial as an adult in the California superior court was barred by the constitutional prohibition against double jeopardy since jeopardy had attached in juvenile court prior to that court's finding that he was not a fit subject for consideration under California's Juvenile Court Law.

PRELIMINARY STATEMENT

In this case, petitioner seeks to relitigate the double jeopardy issue presented to the California Court of Appeal in *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185, *hrg. denied* (Cal.Sup.Ct., Aug. 4, 1971), and resolved adversely to petitioner. Copies of all the essential records appear to have been appended to the petition, and this petitioner has exhausted his remedies in the California courts.

At this point it is instructive to review the procedural steps leading to the Juvenile Court's waiver of jurisdiction over this petitioner. On February 9, 1971, a

petition was filed in the Juvenile Court of Los Angeles County alleging that petitioner Gary Steven Jones was a person described by section 602 of the California Welfare and Institutions Code,[1] in that he had committed an act which, if committed by an adult would constitute a violation of California Penal Code section 211 (robbery). A detention hearing was held, and petitioner was detained pending a hearing on the petition. (*See* Exhs. D and E to Petn., pp. 19-20.)

On March 1, 1971, a "jurisdictional hearing" was held pursuant to section 701.[2] At the conclusion of this hearing, the juvenile court found that the allegations

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[1]Unless otherwise indicated, all further references to California statutes will be to the California Welfare and Institutions Code. Section 602 provides:

"Any person under the age of 21 years who violates any law of this State or of the United States or any ordinance of any city or county of this State defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

[2]Section 701 provides:

"At the hearing, the court shall first consider only the question of whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Sections 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made."

of the petition were true and that petitioner was a person described by section 602. The proceedings were continued for a dispositional hearing pursuant to section 702.[3] [A transcript of the jurisictional hearing is not appended to the petition, but its absence is not crucial because the result may be inferred from the court's comments at the dispositional hearing (*see* Exh. F. to Petn., Petn. p. 27) and because there appears to be no dispute as to the outcome of the jurisdictional hearing.]

After a hearing held on March 15 and 22, 1971, the juvenile court found, pursuant to section 707,[4] that pe-

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[3]Section 702 provides:

"After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

[4]Section 707 provides:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of

(This footnote is continued on next page)

titioner was not a fit subject for treatment as a juvenile and ordered that petitioner be turned over to the Sheriff and district attorney for prosecution as an adult. (Exh. F. to Petn., Petn. p. 38.) The court based its finding of unfitness on the fact that petitioner had been involved in no less than three armed robberies. (*Id.*) The matter was set over one month for a non-appearance report as to the progress of the adult action. (*Id.*)

On April 1, 1971, the juvenile court denied a petition for writ of habeas corpus filed on behalf of this petitioner. This petition raised the same double jeopardy asserted in the instant petition. (Exhs. G and H to

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the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavorial patterns of the person being considered for unfitness."

Petn.) Thereafter this petitioner filed for habeas corpus relief in the California Court of Appeal, Second Appellate District, Division Four. Although that court initially stayed the pending criminal prosecution of this petitioner, it ultimately rejected his double jeopardy claim in a published opinion. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185. On August 4, 1971, the California Supreme Court denied a hearing with respect to the Court of Appeal's decision. (Exh. 1 to Petn.)

Subsequently petitioner was held to answer after a preliminary hearing on the robbery charge. Thereafter an information charging one count of robbery in violation of California Penal Code section 211 was filed in the superior court. Petitioner pleaded not guilty and submitted his case to the court, without a jury, on the transcript of the preliminary hearing. The court found petitioner guilty as charged and ordered him committed to the California Youth Authority where he is currently confined. (*See* Exhs. J-N. to Petn.)

ARGUMENT

PETITIONER WAS NOT PLACED TWICE IN JEOPARDY WHEN THE JUVENILE COURT WAIVED JURISDICTION AND ORDERED HIS PROSECUTION AS AN ADULT

Petitioner contends that the juvenile court's waiver of jurisdiction after witnesses had been sworn at the hearing pursuant to section 701 was a violation of the Fifth Amendment's prohibition against double jeopardy. Respondent submits that double jeopardy is not applicable to such a waiver of jurisdiction.

At the outset, it is clear that double jeopardy is applicable to the States through the Due Process Clause

of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). Although the United States Supreme Court has never expressly decided whether double jeopardy is within the panoply of due process rights made applicable to juvenile court proceedings by its decision in *In re Gault*, 387 U.S. 1 (1967), the California Supreme Court has recently applied the prohibition against double jeopardy to juvenile proceedings, holding that a second juvenile proceeding was barred where the petition had been dismissed in a prior proceeding after a hearing on the merits and under circumstances analogous to an acquittal in a criminal case. *Richard M. v. Superior Court*, 4 Cal. 3d 370, 93 Cal. Rptr. 754, 482 P.2d 664. It is respondent's position in this litigation even if double jeopardy applied to juvenile proceedings as a matter of federal law, the procedure followed in this case did not violate the Fifth Amendment.

It is readily apparent that the rationale behind the double jeopardy clause does not extend to the situation confronting the Court in this case. In *Kepner v. United States*, 195 U.S. 100, 129 (1904), the United States Supreme Court held that the protection afforded by the double jeopardy clause is protection against twice being put in jeopardy and that it applies whether the accused is convicted or acquitted. Implicit in the reasoning of the Court is the notion that there must be some disposition of the proceedings at issue which results in a definitive conclusion tantamount to either an acquittal or a conviction. In the instant case, there was no such definitive resolution of the proceedings—there was merely a transfer of petitioner's case to another forum. Such a transfer does not invoke the bar of double jeopardy.

This conclusion is defensible on either of two theories. The first is that the jurisdictional hearing and subsequent proceedings were roughly analogous to a preliminary hearing in a criminal case. It is well established that jeopardy does not attach at a preliminary hearing. *See, e.g., United States v. Dickerson*, 168 F. Supp. 899, 920 (D.D.C., 1958), *overruled on other grounds*, 271 F.2d 487 (D.C. Cir. 1959). Respondent submits that a jurisdictional hearing pursuant to section 701 (*see* note 2, *supra*) is analogous to a preliminary hearing for purposes of the California Juvenile Court Law where, as here, the juvenile court makes an order waiving jurisdiction and ordering a prosecution of the minor as an adult.

The second theory supporting the conclusion that double jeopardy did not bar this petitioner's prosecution in the adult court is the theory that persuaded the California Court of Appeal. In its decision, the Court of Appeal stated:

> "In the situation before us, while it is true that, under the language in Richard M., jeopardy had attached once the first witness had testified at the 701 hearing, no *new* jeopardy has arisen by the proceedings sending the case to the criminal court." *In re Gary Steven J.*, supra, 17 Cal. App. 3d 710. (Emphasis is court's own.)

Under this theory, the transfer of proceedings was not tantamount to either an acquittal or a conviction. Therefore, petitioner was not placed "twice in jeopardy" because the transfer did not result in any second attachment of jeopardy. In upholding a State's right to retry an accused after a reversal on appeal, the United States Supreme Court has formulated ". . . a concept of continuing jeopardy that has application where

criminal proceedings against an accused have not run their full course." *See Price v. Georgia,* 398 U.S. 323, 326 (1970). Under the circumstances of this case, it is obvious that the proceedings against petitioner had not yet run their full course when the transfer order was made. By a parity of reasoning, it should logically follow that this petitioner's criminal trial was constitutionally permissible under the "continuing jeopardy" principle.

Petitioner cites a comment of the draftsmen of the Model Rules for Juvenile Courts to the effect that once the adjudicatory hearing has begun, the child is in jeopardy and subsequent transfer to the criminal court would violate due process. (Petnr's. Pts. & Auth., p. 13.) As authority for this statement, the comment cites *Hultin v. Beto,* 396 F.2d 216 (5th Cir. 1968). The *Hultin* case holds that a child adjudged a delinquent and held in custody as such cannot be tried by a criminal court *without regard to how he may respond to the guidance given him under the juvenile law,* and does not state or hold that jeopardy, whether or not it attaches in the juvenile proceeding, precludes trial as an adult upon a finding of unfitness.

Indeed, the concept of a transfer hearing before the facts sustaining jurisdiction are found may conceivably afford *less* protection to the minor than the procedure followed in this case. First, it is difficult to perceive how a finding of unfitness can rationally be made without at least a preliminary determination that the minor committed the act charged; and secondly, the minor may be acquitted and released completely during the jurisdictional hearing, without ever having to face criminal charges in an adult court.

In the only federal case to deal squarely with the issue presented here, the court found that an inquiry into the facts of the offense prior to a transfer to adult court was essential to the function of the juvenile court. In *United States. v. Dickerson,* 271 F.2d 487, 491 (D.C. Cir. 1959), the Court of Appeals held that the "full investigation" required by the District of Columbia juvenile court laws prior to a waiver of jurisdiction contemplated at the very least an informal hearing into the allegations of the petition. The Court continued:

> ". . . Consequently, it was not improper for the Juvenile Court to conduct a hearing before determining whether or not to waive jurisdiction. To hold that jeopardy attached at that point would preclude the full and informal investigation in the interests of the minor and the community which Congress thought necessary to achieve the salutary remedial purposes of a juvenile court system." (*Id.* at 491-92.)

Respondent submits that the [*Dickerson*] decision is so closely in point as to control the disposition of this petitioner's claim.

Finally, respondent submits that if petitioner's argument were accepted, it could conceivably bar any waiver of jurisdiction by the California juvenile courts. Such a result would be unfortunate. A minor, such as petitioner, who has committed three armed robberies may well be characterized as a "hardened criminal" with respect to other youths of his same age. Retention of such an offender as a ward of the juvenile court is likely to frustrate the attempts of overworked juvenile probation officers to rehabilitate other minors who may be influenced by the behavior of such an indi-

vidual. The California Legislature undoubtedly intended that the juvenile court have the flexibility to reject such hardened individuals when it enacted section 707.

CONCLUSION

For the foregoing reasons, respondent urges that this petition for a writ of habeas corpus be denied.

Respectfully submitted,

EVELLE J. YOUNGER, Attorney General
HERBERT L. ASHBY, Chief Assistant
Attorney General—Criminal Division
DORIS H. MAIER, Assistant Attorney
General—Writs Section
S. CLARK MOORE,
Deputy Attorney General
By /s/ Russell Iungerich
RUSSELL IUNGERICH
Deputy Attorney General
Attorneys for Respondents

(Affidavit of service omitted in printing.)

PETITIONER'S REPLY MEMORANDUM.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907 LTL.

PETITIONER'S REPLY MEMORANDUM

Filed: January 13, 1972.

Respondent forthrightly concedes either explicitly, or by implication, a number of points central to petitioner's contention that being tried twice in connection with the same incident, once in juvenile court and once in adult court, deprived him of his federal and state constitutional rights not to be twice placed in jeopardy. Respondent concedes that petitioner has exhausted his state remedies.[1] Respondent recognizes that the Supreme Court of California has held that the double jeopardy clause of the Fifth Amendment is applicable to juvenile delinquency proceedings [*Richard M. v. Superior Court*, 4 Cal.3d 370, 93 Cal.Rptr. 754 (1971)], and respondent does not argue that this ruling is erroneous or that it should be rejected by this Court.[2] Respondent also concedes that for federal constitutional purposes the protection afforded by the

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[1]Respondent's Response to Petition for Writ of Habeas Corpus, p. 2, lines 3-4.

[2]*Id.*, p. 7, lines 27-32; p. 8, lines 1-4.

double jeopardy clause is available to the convicted and the acquitted on an equal basis.[3]

Nevertheless, respondent maintains that in order for an accused to be placed twice in jeopardy "there must be some disposition of the proceedings at issue which results in a definitive conclusion tantamount to either an acquittal or a conviction."[4] This statement is totally devoid of any legal foundation. The law is clear that jeopardy attaches in a non-jury trial no later than when the first witness is sworn. *United States v. Jorn,* 91 S.Ct. 547 (1971); *Wade v. Hunter,* 336 U.S. 684, 688 (1949); *Richard M. v. Superior Court,* 4 Cal.3d 370, 93 Cal.Rptr. 752 (1971). These cases establish unequivocally that once jeopardy attaches, it is constitutionally immaterial whether the proceeding is subsequently aborted or proceeds to a "definitive" conclusion.

In *United States v. Jorn, supra,* for example, 91 S. Ct. 547 (1971), the trial court declared a mistrial after the first witness was sworn. Although this trial never proceeded to a "definitive" conclusion, the district court found that the double jeopardy clause prohibited further proceedings and granted defendant's motion to dismiss a subsequently filed indictment. The United States Supreme Court agreed that defendant had been twice placed in jeopardy and affirmed the district court's dismissal of the indictment. If, as the Supreme Court found, the double jeopardy clause bars a second proceeding where the first trial culminates in a mistrial, *a fortiori* the double jeopardy principle is applicable in the case at bar where the jurisdictional hearing was

[3]*Id.*, p. 8, lines 7-11, citing *Kepner v. United States,* 195 U.S. 100, 129 (1904).

[4]*Id.*, p. 8, lines 12-15.

concluded, and the Court sustained the petition finding Gary to be a person described by Cal. W&I Code § 602.[5]

Respondent asserts that a jurisdictional hearing in juvenile court (Cal. W&I Code § 602) is roughly analogous to a preliminary hearing in a criminal case.[6] The argument continues that since jeopardy does not attach at a preliminary hearing in a criminal case, neither does it attach at a jurisdictional hearing in juvenile court.

The Achilles heel in this reasoning is, of course, that a jurisdictional hearing is comparable to a criminal trial and not to a preliminary hearing. If this were not true, the Supreme Court would not have held that at a *jurisdictional hearing* a minor must be accorded his right to confront and cross-examine his accusers [*In re Gault,* 387 U.S. 1 (1967)], and to be tried in accordance with a reasonable doubt standard [*In re Winship,* 397 U.S. 358 (1970)], rights not granted to adult criminals at preliminary hearings. Similarly, the California Supreme Court has held that the juvenile court may not examine a minor's probation report at the jurisdictional hearing precisely because it would prejudice the Court's determination of guilt or innocence. *In re Gladys R.,* 1 Cal.3d 855, 83 Cal. Rptr. 671 (1970).

Section 701 of the Cal. W&I Code establishes the rules governing jurisdictional hearings. It provides that at such a hearing, ". . . the [juvenile] court shall first consider only the question whether the minor is a per-

[5]The junvenile court's minute order was annexed to relator's petition as Exhibit "E".

[6]Respondent's Response to Petition for Writ of Habeas Corpus, p. 8, lines 26-31.

son described by Section . . . 602. . . ." Cal. W&I Code § 602 provides, in pertinent part,

> "Any person under the age of 21 years who violates any law of this State or of the United States . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Since under this language the juvenile court is required to find the minor's guilt of an underlying law violation in order for the court to adjudicate him a person described by Cal. W&I Code § 602, this proceeding is clearly akin to a criminal trial, and not to a preliminary hearing.[7]

Respondent cites *Price v. Georgia,* 398 U.S. 323 (1970), for the proposition that the United States Supreme Court has formulated a concept of continuing jeopardy which applies where criminal proceedings have not run their full course.[8] But the language in *Price* refers to a situation where a defendant appeals and obtains a reversal of his conviction. It is, of course, well-established that double jeopardy does not prohibit the State from retrying a defendant who has secured a reversal on appeal. See *Green v. United States,* 355 U.S.

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[7]The Juvenile Court Law's analogue to a preliminary hearing in a criminal case is the detention hearing. "Unless sooner released, a minor taken into custody under the provision of this article shall be brought before a judge or referee of the juvenile court for a hearing (which shall be referred to as a 'detention hearing') to determine whether the minor shall be further detained, as soon as possible but in any event before the expiration of the next judicial day after a petition to declare such minor a ward . . . has been filed. If the minor is not brought before a judge or referee of the juvenile court within the period prescribed by this section, he shall be released from custody." Cal. W&I Code § 632. The standards for detention are set forth in Cal. W&I Code § 636.

[8]Respondent's Response to Petition for Writ of Habeas Corpus, p. 9, lines 19-20.

184, 189 (1957); *United States v. Ball,* 163 U.S. 662 (1896). By filing a notice of appeal the defendant has waived his right to plead jeopardy as a bar to a subsequent prosecution.[9]

But the remand of Gary Steven Jones from juvenile to adult court cannot be attributed to a voluntary act or decision by the minor. Since Gary opposed the transfer of jurisdiction from juvenile to adult court, and interposed a plea of "once convicted, once in jeopardy," he clearly did not waive his right to be protected by the double jeopardy prohibition. His case is similar to *United States v. Sabella,* 272 F.2d 206 (2d Cir. 1959), where defendants challenged on appeal the legality of their sentences but did not attack the validity of their convictions. Since they themselves had not put in issue the legality of their convictions, and since they had not waived any rights emanating from the prohibition against double jeopardy, the court held that a second trial in connection with the same underlying incident would be barred.

In short, the doctrine of "continuing jeopardy" is a bugaboo which has no basis in law except insofar as it is inartfully employed to justify a retrial following a successful appeal. Where the defendant is tried twice for the same underlying offense, where each trial results in a finding that he committed the act of which he was accused, and where each trial exposes him "to his loss of liberty for years" [*In re Gault,* 387 U.S. 1, 36 (1967)], it would be the sheerest caprice to claim that the defendant should not be immune from this

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[9]It is also evident that our entire system of appellate review of criminal convictions is premised upon the appellate court's power to remand for a retrial. Appellate courts would most certainly be reluctant to reverse criminal convictions if every reversal insulated the defendant from subsequent prosecution.

double prosecution because the juvenile court proceeding was terminated prior to disposition. See *United States v. Jorn*, 91 S.Ct. 547 (1971). Nor may petitioner's constitutional rights be adulterated because the two proceedings were conducted in different courts using different legal nomenclature. *United States v. Dickerson*, 168 F.Supp. 899, 902 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C.Cir. 1959).

There is no inherent difficulty in holding the "fitness" or "transfer of jurisdiction" hearing (Cal. W&I Code § 707) prior to the jurisdictional hearing (Cal. W&I Code § 701). According to the California Supreme Court, the only factor which the juvenile court must consider at the section 707 hearing is the minor's behavior pattern as described in the probation officer's report. *Jimmy H. v. Superior Court*, 3 Cal.3d 709, 714, 91 Cal.Rptr. 601, 603 (1970). No reason exists why such a report could not be prepared for use at a "fitness" hearing conducted prior to the jurisdictional hearing.

Respondent suggests that a finding of unfitness cannot rationally be made without a determination that the minor committed the act charged.[10] This view is open to question since the California Supreme Court, in considering the subject, has declined to promulgate this requirement. That Court stated only that the juvenile court may consider, among other factors, "the nature of the crime allegedly committed" and "the circumstances and details surrounding its commission" [*Jimmy H. v. Superior Court*, 3 Cal.3d 709, 714, 91

[10]Respondent's Response to Petition for Writ of Habeas Corpus, p. 10, lines 10-13.

Cal.Rptr. 600, 604 (1970)]; and one court has overturned a finding of unfitness because the only factor considered by the juvenile court was the seriousness of the underlying crime [*Bruce M. v. Superior Court*, 270 CA2d 566, 75 Cal.Rptr. 881, 884 (1969)]. In fact Cal. W&I Code § 707 itself provides (in pertinent part),

> "In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provision of the Juvenile Court Law."

Thus, under Cal. W&I Code § 707 the determination as to whether a minor is amenable to the care, treatment, and training program available through the facilities of the juvenile court may, or may not, encompass an examination into the nature of the case against the minor. But, in any event, any preliminary determination of guilt which the juvenile court may wish to make has, of necessity, already been made at the detention hearing where the probation department is required to show that detention is "a matter of immediate and urgent necessity for the protection of such minor or the person or property of another . . ." Cal. W&I Code § 636. The Supreme Court of California has clearly stated,

> ". . . in a delinquency [detention] hearing the probation officer will be required to present a prima facie case that the minor committed the offense, since the 'immediate and urgent necessity' for detention is necessarily premised upon the assumption." *In re William M.*, 3 Cal.3d 16, 28, 89 Cal.Rptr. 33, n.20 at 28, 41 (1970).

Since the fitness hearing focuses upon the minor's amenability to treatment, and not his guilt of the underlying offense, the examination into whether there is a prima facie case at the detention hearing, supplemented by whatever investigation the court chooses to make at the fitness hearing, will provide the court with more than a sufficient factual basis for its fitness determination.[11]

The experts on delinquency have agreed that fitness hearings can and should be conducted prior to the inception of the jurisdictional hearing. Thus, Rule 9 of the Model Rules for Juvenile Courts, prepared by the Council of Judges of the National Council on Crime and Delinquency (1968), provides:

> "If at any time after the filing of a petition and *prior to the commencement of the adjudicatory hearing* the court is informed that the child is legally subject to transfer to criminal court, and that there is reason to believe that retention of jurisdiction in the juvenile court is contrary to the best interests of the child or the public, a transfer hearing may be scheduled, and the probation departments shall conduct a transfer investigation." [Emphasis supplied.]

And Section 34(a) of the third tentative draft [May, 1968] of the Uniform Juvenile Court Act, prepared by the American Bar Association National Institute, similarly provides,

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[11]It is constitutionally irrelevant that Gary Steven Jones could have been acquitted during the jurisdictional hearing. The same comment could be said about the defendants in *Kepner v. United States,* 195 U.S. 100 (1904), or *In re Nielson,* 131 U.S. 176 (1889), where it was held that double jeopardy prohibited second prosecutions. And the fact remains that petitioner, like the defendants in those cases, was—in fact—convicted.

> "After a petition has been filed charging delinquency based on conduct which is designated a public offense under the laws, including local ordinances, of this state the court may, *before hearing the petition on its merits,* transfer the offense for criminal prosecution to the appropriate Court having jurisdiction of the offense. . . ." [Emphasis supplied.]

And, as we have noted before, the former Presiding Judge of the Los Angeles Juvenile Court is of the view that his court would not be hampered by a ruling that the fitness determination must be reached before jeopardy attaches at the jurisdictional hearing.[12]

There is, therefore, no basis to conclude that the relief petitioner seeks is not practically feasible, as well as constitutionally compelled. But, assuming a certain amount of inconvenience, such inconvenience cannot justify denial of a right of constitutional magnitude. See *Baldwin v. New York,* 399 U.S. 66 (1970); *Bramlett v. Peterson,* 307 F.Supp. 1311, 1316-1317 (M.D.Fla. 1969); *Phillips v. Cole,* 298 F.Supp. 1049, 1053 (N.D.Miss. 1968). The double jeopardy clause is absolute in its language and fundamental to our criminal and juvenile justice systems alike. The clash between existing California procedure for determining fitness and the historic principle of double jeopardy must, under the Supremacy Clause, be reconciled in favor of the constitutional guarantee. Cf. *Mayer v. Chicago,* 40 U.S.L.W. 4055 (1971).

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[12]See Exhibit "H", annexed to relator's petition, p. 62.

Conclusion

For the foregoing reasons and the reasons presented in the Points and Authorities in Support of Relator's Petition for a Writ of Habeas Corpus, this Court must issue a writ of habeas corpus directing respondents BREED and McKIBBEN to release GARY STEVEN JONES from his present unlawful detention and remanding him to the Juvenile Court of Los Angeles County for disposition.

Dated: January 12, 1972.

Respectfully submitted,

Peter Bull

Robert L. Walker

Donald W. Pike

By /s/ Robert L. Walker

Robert L. Walker

(Certificate of Service omitted in printing).

DISTRICT COURT ORDER FOR HEARING.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil No. 71-2907-LTL.

Filed: Jan. 27, 1972.

ORDER FOR HEARING

In this action, a petition for writ of habeas corpus has been filed. Pursuant to this Court's Order, a response has been filed by respondents. Petitioner has filed a reply memorandum thereto.

IT IS ORDERED that a hearing on this petition and the pleadings be set for March 6, 1972, at 10:00 a.m.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order by mail this date on the petitioner and on the respondents.

DATED: January 27, 1972.

/s/ Lawrence T. Lydick

Lawrence T. Lydick

United States District Judge

DISTRICT COURT MINUTES, MARCH 6, 1972.

United States District Court, Central District of California.

Civil Minutes—General.

Date March 6, 1972.

Case No. 71-2907-LTL.

Title Gary Steven Jones -vs- Allen F. Breed, et al.

Docket Entry: Held hrg & ent ord (LTL) Petn's petn for O.S.C. Why petn for Writ of H/C should not be issued is ord submitted. (LTL).

Present: Hon. Lawrence T. Lydick, Judge; R. A. Klein, Deputy Clerk; Barbara J. Killion, Court Reporter.

Attorneys Present for Plaintiffs: Robert L. Walker, Donald W. Pike.

Attorneys Present for Defendants: Russell Iungerich.

Proceedings: Hearing: Petitioner's Petition for Order to Show Cause Why Petitioner's Petition for Writ of Habeas Corpus should not be issued.

Court orders said petition stands submitted.

MEMORANDUM AND ORDER OF DISTRICT COURT DENYING PETITION FOR WRIT OF HABEAS CORPUS.

(This document has been omitted from this Appendix because it appears as Appendix B to the Petition for Writ of Certiorari at pages 16-19.)

NOTICE OF APPEAL.

In the United States District Court, for the Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority, Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. Civil Action No. 71-2907 LTL.

Filed: June 5, 1972.

NOTICE IS HEREBY GIVEN that GARY STEVEN JONES, by and through his guardian ad litem, LOLA MAE JONES, petitioner, appeals to the United States Court of Appeals for the Ninth Circuit from the order dated May 5, 1972, filed May 5, 1972, denying petitioner's petition for a writ of habeas corpus.

Dated: May 26, 1972.

PETER BULL
ROBERT L. WALKER
DONALD W. PIKE
Attorneys for Petitioner-Appellant

By /s/ Robert L. Walker
ROBERT L. WALKER

DISTRICT COURT ORDER DENYING CERTIFICATE OF PROBABLE CAUSE.

United States District Court, Central District of California.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, vs. Allen F. Breed, Director of the California Youth Authority, Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. No. 71-2907-LTL.

ORDER

Filed: June 21, 1972.

The Petition for Certificate of Probable Cause in the above matter is denied.

DATED: June 21, 1972.

/s/ Lawrence T. Lydick

Lawrence T. Lydick

United States District Judge

COURT OF APPEALS ORDER, GRANTING CERTIFICATE OF PROBABLE CAUSE.

United States Court of Appeals, for the Ninth Circuit.

Gary Steven Jones, Petitioner, vs. Allen F. Breed, Director of The California Youth Authority, et al., Respondents. Misc. 72-8021, DC 71-2907 (LTL) C. Cal.

ORDER

Filed: Aug. 31, 1972.

Petitioner, a California state prisoner, seeks a certificate of probable cause for appeal from an order denying a petition for a writ of habeas corpus.

An issue being raised that is not frivolous, the application is granted.

/s/ Richard H. Chambers

United States Circuit Judge

COURT OF APPEALS ORDER GRANTING MOTION TO APPEAL IN FORMA PAUPERIS.

United States Court of Appeals for the Ninth Circuit.

Gary Steven Jones, A Minor, By Lola Mae Jones, Guardian ad litem, Petitioner-Appellant, vs. Allen F. Breed, Director of The California Youth Authority, et al., Respondents-Appellees. 72-2644, DC 71-2907 (LTL) C. Cal.

ORDER

Filed: September 25, 1972.

An application for a certificate of probable cause was granted in this court on August 31, 1972.

The motion to appeal in forma pauperis is granted.

/s/ Richard H. Chambers

United States Circuit Judge

OPINION OF THE COURT OF APPEALS.

(This document has been omitted from this Appendix because it appears as Appendix A to the Petition for Writ of Certiorari at pages 1-15.)

PETITION FOR STAY OF MANDATE.

United States Court of Appeals for the Ninth Circuit.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner-Appellant, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. No. 72-2644.

PETITION FOR STAY OF MANDATE
PENDING APPLICATION FOR CERTIORARI
And
PROPOSED STAY OF MANDATE
PENDING APPLICATION FOR CERTIORARI
PURSUANT TO RULE 41(b)

Filed: May 31, 1974.

United States Court of Appeals for the Ninth Circuit.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner-Appellant, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. No. 72-2644.

PETITION FOR STAY OF MANDATE
PENDING APPLICATION FOR CERTIORARI

Pursuant to Rule 41(b), the appellees herein petition this Court for a stay of the mandate pending their application to the United States Supreme Court for a writ of certiorari.

The appellees submit that the double jeopardy issue decided by this Court is an important question not previously passed upon by the United States Supreme Court and involves a conflict of decisions. These factors combine to create a substantial prospect that this case may command four votes for review in this Supreme Court. No decision of the United States Supreme Court has held that double jeopardy applies to juvenile court proceedings, let alone to the transfer proceedings between juvenile court and adult court which were involved in this case. In addition to the fact that the question involved is both important and novel, this Court's decision in effect overrules the decisions of the California courts which held that a juvenile's prosection in both the juvenile and adult courts was one proceeding involving "continuing jeopardy." *Bryan v. Superior Court*, 7 Cal. 3d 575, 578, 102 Cal. Rptr. 831, 498 P.2d 1079 (1972), *cert. denied*, 410 U.S. 944 (1973); *In re Gary J.*, 17 Cal. App. 3d 704 (1971). This Court's decision also conflicts with the earlier federal case of *United States v. Dickerson*, 271 F.2d 487 (D.C. Cir. 1959). Thus, both the importance and novelty of the question involved and the apparent conflict of decisions makes this case an appropriate one for the granting of a stay of the mandate because of the substantial prospect that this case may command four votes for review. *See Organized Village of Kake v. Egan*, 89 S. Ct. 33, 35, 4 L. Ed. 2d 34 (1959) (opinion of Mr. Justice Brennan as Circuit Justice).

Unless a stay is granted, this Court's decision will likely result in appellant's release from all custody before the United States Supreme Court has an opportunity to rule on the petition for a writ of certiorari. At present, appellant is on parole from the California

Youth Authority under a commitment which will last until 1978 unless terminated earlier. On June 22, 1974, appellant Jones will reach his 21st birthday and will no longer be subject to the jurisdiction of the California Juvenile Court for the further proceedings outlined in this Court's opinion. If the mandate of this Court were stayed pursuant to Rule 41(b), appellant Jones would remain on Youth Authority parole until sometime in October of 1974, when a ruling on the petition for certiorari would likely be handed down. In the event that appellees were ultimately successful on the merits, a release of appellant Jones from his constructive custody on parole at this juncture might result in the disruption of his life by reapprehension if and when a Supreme Court decision favorable to appellees became effective.

Since the issue involved in this case is one of importance and also one of first impression, the appellees submit that the substantial prospects of a favorable ruling on a petition for certiorari should militate in favor of the grant of this stay so that the appellees are not required to comply with this Court's order until after their remedy by way of certiorari has been exhausted.

WHEREFORE, the appellees pray that the mandate of this Court which will issue on June 5, 1974, be stayed for 30 days pending the timely filing of a petition for writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

DATED: May 29, 1974.

Respectfully submitted,

EVELLE J. YOUNGER, Attorney General
of the State of California

JACK R. WINKLER, Chief Assistant Attorney General—Criminal Division
S. CLARK MOORE
Assistant Attorney General
By /s/ Russell Iungerich
RUSSELL IUNGERICH
Deputy Attorney General
Attorneys for Respondents-Appellees

(Affidavit of service by mail omitted in printing.)

OPPOSITION TO PETITION FOR STAY OF MANDATE.

In the United States Court of Appeals, for the Ninth Circuit.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner-Appellant, v. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents-Appellees. No. 72-2644.

OPPOSITION TO PETITION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI

For a party to interfere with the normal course of appellate processes by obtaining a stay of the Court of Appeal's mandate, he must meet two clearly established criteria. *First,* he must demonstrate irreparable injury.[1] *Second,* he must demonstrate that there is a substantial likelihood that at least four justices of the Court will vote to grant certiorari.[2] In the case of the present application, neither condition for relief has been satisfied.

The only reference to irreparable injury in appellee's petition is the possibility that appellant—who is presently on parole from the California Youth Authority—might be reapprehended if appellees ultimately prevail in the Supreme Court. This purported injury, however, is not an injury to appellees. It is certainly an ex-

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[1]See *Long Beach Federal Savings and Loan Assn. v. Federal Home Loan Bank,* 80 S.Ct. 18 (1955) [op. of Douglas, J. as Circuit Justice]; *English v. Cunningham,* 80 S.Ct. 18 (1959) [op. of Frankfurter, J. as Circuit Justice].

[2]See *Edwards v. New York,* 76 S.Ct. 1058, 1059 (1956) [op. of Harlan, J. as Circuit Justice].

traordinary perversion of the irreparable injury rule for the losing party to assert that irreparable injury might, therefore, befall *the party who has prevailed.*

In addition, appellees' fears are entirely speculative. Even if appellees were to ultimately prevail, there is no reason for appellant to be rearrested. The probable remedy would be for the judgment of conviction to be reinstated and for appellant to revert to his previous status as a CYA parolee. *Finally,* this minimal inconvenience can not properly be considered an *irreparable* injury.[3]

Appellees have also failed to demonstrate either that this court's opinion is erroneous, or that there is any likelihood that their certiorari petition will be granted. While a conflict between circuits is a criterion used in ruling upon certiorari petitions, no conflict exists here. The only other case from a Circuit Court of Appeal, *Fain v. Duff,* 488 F.2d 218 (5th Cir. 1973), is squarely in agreement with this Court's decision. Although appellees assert that there is a conflict between *Jones v. Breed* and *United States v. Dickerson,* 271 F.2d 487 (D.C. Cir. 1959), the differences between the two cases were carefully considered by this Court in its opinion.[4] As this Court correctly noted, the statements in *Dickerson* in conflict with this Court's decision are dicta and have been undermined by *Kent, Gault,* and *Winship.*[5]

Finally, there is no disagreement among the courts as to the applicability of the double jeopardy guarantee to juvenile delinquency proceedings. As this Court discussed in its opinion, the states which have recently

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[3]See *Long v. Robinson,* 432 F.2d 977, 980 (4th Cir. 1970).
[4]Slip op. at p. 10.
[5]*Ibid.*

considered this issue have unanimously ruled that the double jeopardy clause is applicable in the juvenile court.[6] There is no reason to believe that the Supreme Court would reach out to resolve an issue upon which the state courts have been in universal agreement.

CONCLUSION

For the foregoing reasons appellees' petition for a stay of this Court's mandate should be denied.

Dated: June 3, 1974.

Respectfully submitted,

/s/ Robert L. Walker
Robert L. Walker
Attorney for Petitioner-Appellant

(Certificate of Service omitted in printing.)

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[6]See *Richard M. v. Superior Court,* 4 Cal.3d 370, 482 P.2d 664 (1971); *Anonymous v. Superior Court,* 10 Ariz. App. 243, 457 P.2d 956 (1969); *State v. Gibbs,* 94 Idaho 908, 500 P.2d 209 (1972); *State v. Halverson,* 192 N.W.2d 765 (Iowa 1971); *Collins v. State,* 429 S.W. 2d 650 (Tex. App. 1968); *Colorado in Interest of J.A.M.,* 483 P.2d 362 (Colo. Sup. Ct. 1971).

ORDER STAYING ISSUANCE OF MANDATE.

United States Court of Appeals, for the Ninth Circuit.

Gary Stevens Jones, etc., Petr-appellant vs. Allen F. Breed, etc., et al., Respdts-appellees. No. 72-2644.

ORDER STAYING ISSUANCE OF MANDATE

Filed: June 18, 1974.

Upon application of Russell Iungerich, counsel for the appellees, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellees herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before July 5, 1974.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ J. Clifford Wallace

United States Circuit Judge.

Dated: San Francisco, Calif. June 11, 1974.

Supreme Court, U. S.
FILED
DEC 12 1974
CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

Opinions Below

The opinion of the Court of Appeals is reported at 497 F.2d 1160 (9th Cir. 1974) and appears in Appendix A to the Petition for Writ of Certiorari. The opinion rendered by the United States District Court for the Central District of California is reported as *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972), and is reprinted in Appendix B to the Petition for Writ of Certiorari. The prior opinion of the California Court of Appeal disposing of respondent Jones' identical claim on state habeas corpus is reported as *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971), *hrg. denied* by California Supreme Court on August 4, 1971, and is reprinted in Appendix C to the Petition for Writ of Certiorari.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 15, 1974. This petition for certiorari was filed on July 8, 1974, and was granted on October 21, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Was respondent Gary Steven Jones placed twice in jeopardy when the California juvenile court, after a finding of delinquency and upon determining that this minor was unfit for treatment as a juvenile, waived jurisdiction and directed the district attorney to file criminal charges in adult court?

Constitutional Provisions Involved

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis added.)

United States Constitution, Amendment XIV, Section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions Involved

For purposes of clarity, the four principal provisions of the California Juvenile Court Law pertinent to this case are set forth verbatim as footnotes in the Statement of the Case which follows. Additional relevant statutes are:

California Welfare and Institutions Code Section 606:

> "When a petition has been filed in a juvenile court, the minor who is the subject of the petition shall not thereafter be subject to criminal prosecution based on the facts giving rise to the petition unless the juvenile court finds that the minor is not a fit and proper subject to be dealt with under this chapter and orders that criminal proceedings be resumed or instituted against him."

California Welfare and Institutions Code Section 607:

> "The [juvenile] court may retain jurisdiction over any person who is found to be a ward or dependent child of the juvenile court until such ward or dependent child attains the age of 21 years." (Brackets added.)

California Welfare and Institutions Code Section 1730:

> "(a) No person may be committed to the [California Youth] Authority until the Authority has

certified in writing to the Governor that it has approved or established places of preliminary detention and places for examination and study of persons committed, and has other facilities and personnel sufficient for the proper discharge of its duties and functions.

"(b) Before certification to the Governor as provided in subsection (a), a court shall, upon conviction of a person under 21 years of age at the time of his apprehension, deal with him without regard to the provisions of this chapter." (Brackets added.)

California Welfare and Institutions Code Section 1731.5:

"After certification to the Governor as provided in this article a court may commit to the authority any person convicted of a public offense who comes within subdivisions (a), (b), and (c), or subdivisions (a), (b), and (d), below:

"(a) Is found to be less than 21 years of age at the time of apprehension.

"(b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment.

"(c) Is not granted probation.

"(d) Was granted probation and probation is revoked and terminated.

"The Youth Authority shall accept a person committed to it pursuant to this article if it believes

that the person can be materially benefited by its reformatory and educational discipline, and if it has adequate facilities to provide such care."

California Welfare and Institutions Code Section 1769:

"Every person committed to the authority by a juvenile court shall be discharged upon the expiration of a two-year period of control or when the person reaches his 21st birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800)."

California Welfare and Institutions Code Section 1771:

"Every person convicted of a felony and committed to the authority shall be discharged when such person reaches his 25th birthday, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800) or unless a petition is filed under Article 5 of this chapter. In the event such a petition under Article 5 is filed, the authority shall retain control until the final disposition of the proceeding under Article 5."

California Welfare and Institutions Code Section 1800:

"Whenever the Youth Authority Board determines that the discharge of a person from the control of the Youth Authority at the time required by Section 1769, 1770, 1770.1, or 1771, as applicable, would be physically dangerous to the public because of the person's mental or physical deficiency, disorder, or abnormality, the board, through its

chairman, shall make application to the committing court for an order directing that the person remain subject to the control of the authority beyond such time. The application shall be filed at least 90 days before the time of discharge otherwise required. The application shall be accompanied by a written statement of the facts upon which the board bases its opinion that discharge from control of the Youth Authority at the time stated would be physically dangerous to the public, but no such application shall be dismissed nor shall an order be denied merely because of technical defects in the application."

Statement of the Case

On February 9, 1971, a petition was filed in the Juvenile Court of Los Angeles County Superior Court alleging that respondent Gary Steven Jones was a person described by section 602 of the Welfare and Institutions Code,[1] in that he had committed an act which if committed by an adult, would constitute a violation of California Penal Code section 211 (robbery). A detention hearing was held, and respondent was de-

[1]Unless otherwise indicated, all further references to California statutes will be to the California Welfare and Institutions Code. As of the date of filing of the petition in this case, section 602 provided:

"Any *person* under the age of *21* years *who* violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, which may adjudge such person to be a ward of the court." (Emphasis added.)

An amendment in 1971 lowered the jurisdiction age from 21 to 18. A 1972 amendment added "who is" after "person" and substituted "when he" for "who" before "violates."

tained pending a hearing on the petition. [*See* App. pp. 15-18.]

On March 1, 1971, a "jurisdictional hearing" was held pursuant to section 701.[2] At the conclusion of this hearing, the juvenile court found that the allegations of the petition were true and that respondent was a person described by section 602. The proceedings were continued for a dispositional hearing pursuant to section 702.[3] [App. pp. 17-18.]

[2]Section 701 provides:

"At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, *proof beyond a reasonable doubt* supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made." (Emphasis added.)

A 1971 amendment effective subsequent to respondent's jurisdictional hearing, substituted "proof beyond a reasonable doubt" as above for "a preponderance of evidence." Respondent Jones, however, has made no claim in the courts below that the standard of proof failed to satisfy due process under *In re Winship*, 397 U.S. 358 (1972).

[3]Section 702 provides:

"After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged

(This footnote is continued on next page)

After a hearing held on March 15 and 22, 1971, the juvenile court found, pursuant to section 707,[4]

from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

This section has not been amended since the date of respondent's hearing.

[4]Section 707 provides today, as it provided at the time of respondent's hearing, as follows:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in

that respondent was not a fit subject for treatment as a juvenile and ordered that respondent be turned over to the sheriff and district attorney for prosecution as an adult. [App. pp. 32-33.] The juvenile court based its finding of unfitness on the fact that respondent had been involved in no fewer than three armed robberies. [*Id.*] The matter was set over one month for a nonappearance report as to the progress of the adult action. [*Id.*]

On April 1, 1971, the juvenile court denied a petition for state writ of habeas corpus filed on behalf of this respondent. This petition raised the same double jeopardy issue raised in respondent's petition for writ of habeas corpus in federal district court. [App. pp. 34-35.] Thereafter respondent sought habeas corpus relief in the California Court of Appeal, Second Appellate District, Division Four. Although that court initially stayed the pending criminal prosecution of respondent, it ultimately rejected his double jeopardy claim in a published opinion. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971). On August 4, 1971, the California Supreme Court denied this re-

itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

spondent's petition for hearing with respect to the Court of Appeal decision. [App. p. 46.]

Subsequently respondent was held to answer after a preliminary hearing on the robbery charge. Thereafter an information charging one count of robbery in violation of California Penal Code section 211 was filed in the California superior court. Respondent Gary Steven Jones pleaded not guilty and submitted his case to the court, without a jury, on the transcript of the preliminary hearing. The court found respondent guilty as charged and ordered him committed to the California Youth Authority where he is currently in constructive custody on parole. [See App. pp. 48-63.] No appeal was taken from that judgment of conviction.

On December 10, 1971, respondent Gary Steven Jones, through his mother as guardian *ad litem,* filed the instant petition for writ of habeas corpus in the District Court. [App. p. 7.] After receiving a response on behalf of the California Youth Authority and after hearing argument from both parties, the District Court denied the petition for writ of habeas corpus in an order filed May 5, 1972. *Jones v. Breed,* 343 F. Supp. 690 (C.D. Cal. 1972).

Respondent filed a timely notice of appeal. [App. p. 115.] On June 21, 1972, the District Court denied respondent's application for a certificate of probable cause. [App. p. 116.]

On August 31, 1972, Chief Judge Chambers of the Ninth Circuit granted respondent's application for a

certificate of probable cause and his motion to appeal *in forma pauperis.* [App. p. 117.]

On May 15, 1974, the Ninth Circuit reversed the judgment of the District Court "with directions for the District Court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition." *Jones v. Breed,* 497 F.2d 1168 (9th Cir. 1974), reprinted as Appendix A to Pet. for Cert.

On June 18, 1974, Judge Wallace of the Ninth Circuit granted a stay of the mandate of that court under Rule 41(a) of the Federal Rules of Appellate Procedure pending the filing, consideration and disposition by this Court of the instant petition for writ of certiorari. The stay order further provided that, in the event the petition for writ of certiorari was granted, this stay was to continue pending the final disposition of the case by this Court. [App. p. 126].

On October 21, 1974, this Court granted respondent's motion for leave to proceed *in forma pauperis* and granted the petition for writ of certiorari.

Summary of Argument

Despite the holding of the Ninth Circuit below that the constitutional prohibition against double jeopardy is applicable to the juvenile courts, the question presented by this case does not require determination of the broad issue of the applicability of double jeopardy within the juvenile court system. Unlike *In re Gault,*

387 U.S. 1 (1967), *In re Winship,* 397 U.S. 358 (1970) and *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), the question here is not whether constitutional rights guaranteed to adult criminal defendants are also constitutionally mandated in delinquency adjudications within the juvenile court system. Since respondent Jones is a criminal defendant, there is no question that the prohibition against double jeopardy would bar his re-prosecution for an offense on which he had already been once in jeopardy. *Benton v. Maryland,* 395 U.S. 784, 794 (1969). Thus the issue presented by this case is whether, when the juvenile court transfers a case to the adult criminal court following an adjudication of delinquency, the adjudication of delinquency is a "prior jeopardy" which bars the subsequent criminal prosecution. Sound principles of constitutional adjudication, as well as the constitutional requirement of a live case or controversy, preclude this Court from deciding the strictly collateral question of the general applicability of the double jeopardy clause to the juvenile courts.

This Court has stated that the Fifth Amendment guarantee against double jeopardy furthers three separate constitutional policies: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense following conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). The transfer of respondent Jones from juvenile court to

adult criminal court violates none of these policies. Since no new jeopardy was involved in the adult proceedings, there was but a single "continuing jeopardy" because the proceedings against respondent Jones had not "run their full course." *Price v. Georgia,* 398 U.S. 323, 326 (1970).

Due process should not mandate the application of double jeopardy to bar the adult criminal trial of a minor transferred from juvenile court after a finding of delinquency. The effect of such an application of double jeopardy would be to engraft a cumbersome preliminary hearing procedure onto the already over burdened juvenile court structure. The duplication thus engendered could lead to an attrition of the juvenile court's ability to perform in its unique manner by reducing its flexibility as to dispositional alternatives and by generally hampering the speed of its proceedings. Moreover, the use of transfer as a dispositional alternative does not offend any principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934). The majority of states permit transfer after an adjudication of delinquency, and both the Uniform Juvenile Court Act and the Standard Juvenile Court Act do not propose to alter these statutory provisions.

ARGUMENT

I

This Case Does Not Present the Broad Question of Whether Double Jeopardy Applies to Juvenile Proceedings

In its opinion below, the Ninth Circuit initially concluded that ". . . the Fifth Amendment guarantee of double jeopardy is fully applicable to juvenile court proceedings." *Jones v. Breed,* 497 F.2d 1160, 1165 (9th Cir. 1974). *See* Appendix A to Pet. for Cert., p. 9. Petitioner Breed submits that such an expansive holding is not warranted by the narrow context of this case. Nor is it consistent with sound principles of constitutional adjudication. At the outset, therefore, it is necessary to focus attention on the real nature of the issue presented for decision by this Court.

The speculation that juvenile court proceedings might raise double jeopardy questions is of comparatively recent origin. The English experience at common law contains no meaningful precedents in this regard. At common law, children under age seven were considered incapable of possessing criminal intent, and children above that age were subjected to arrest, trial, and punishment like adult offenders. *In re Gault,* 387 U.S. 1, 16 (1967). *See also* R. Perkins, *Criminal Law* 839 (2d ed. 1969). Neither the American colonial experience nor the proceedings which led to the ratification of the Sixth Amendment suggest that "twice in jeopardy" had an original meaning which would encompass delinquency proceedings in juvenile court. To infer such intent on the part of the framers would impute to them a prescience uncommon to ordinary mortals; it was not until 1899, over a century later, that the

first juvenile court law was enacted in Illinois. *See* Act of April 21, 1899, [1899] Ill. Stat. 131, currently Ill. Rev. Stat. ch. 37, §§ 701-707.

Two recent developments have engendered discussion of the potential application of double jeopardy to juvenile delinquency proceedings. The first involved the expanded application of the Fifth Amendment guarantee against double jeopardy through its incorporation into the Due Process Clause of the Fourteenth Amendment. In *Benton v. Maryland,* 395 U.S. 784, 794 (1969), this Court held that ". . . the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . it should apply to the States through the Fourteenth Amendment." The fact that the double jeopardy clause is binding on the States is not conclusive as to the application of this provision to juvenile delinquency proceedings. In a second line of cases, this Court has held that not all of the provisions of the Bill of Rights applicable to criminal trials are obligatory in juvenile cases. The landmark *Gault* decision adopted a case-by-case approach in determining that notice, confrontation, counsel and the privilege against self-incrimination were applicable to the adjudicative hearing where the delinquency determination is made. *See In re Gault, supra,* 387 U.S. at 13-14. Later in *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), this Court held that the Sixth Amendment right to a jury trial was not constitutionally required in juvenile proceedings even though this right had been held applicable to the States in *Duncan v. Louisiana,* 391 U.S. 145 (1968).

The instant case lies at the point where these two lines of due process cases converge. In ascertaining the requirements of due process in the context of this case,

the analysis employed in neither *Benton* nor *Gault* is wholly satisfactory. Here respondent Jones was transferred from juvenile court to adult criminal court for trial. The plea of double jeopardy was interposed not to bar further proceedings in juvenile court, but to forestall his trial as an adult in criminal court. As an adult criminal defendant, *Benton v. Maryland* clearly established his right to the protection of the Fifth Amendment guarantee against double jeopardy. *Therefore, the real issue is whether due process in a criminal case requires the characterization of the pre-transfer delinquency proceedings in juvenile court as a "prior jeopardy."*

In view of the foregoing analysis, it is readily apparent that the Ninth Circuit decided a question not directly before it when it held double jeopardy to be fully applicable to juvenile court proceedings. Since respondent Jones was an adult criminal defendant when the double jeopardy issue arose, the present case was not just a further development in the progression from *Gault* to *McKeiver*. *Gault* and its progeny were all concerned with the internal applicability of various due process rights within the juvenile court. *Gault* held that notice, the rights to confrontation and counsel and the privilege against self-incrimination obtained in delinquency proceedings. *In re Winship*, 397 U.S. 358 (1970), held that the constitutional safeguard of proof beyond a reasonable doubt was also a requirement of due process in these proceedings. Most recently, *McKeiver v. Pennsylvania, supra,* concluded that the right to jury trial was not constitutionally required when the juvenile court adjudicated the issue of delinquency. The common thread in all of these cases was that the Court was concerned with the rights of the juvenile

while his case was still before the juvenile court. Since this case involves the determination of respondent Jones' rights after he had been transferred out of juvenile court, the *Gault-Winship-McKeiver* line of cases is not directly applicable to a resolution of the issue raised in this case.

The question of whether double jeopardy is partially or fully applicable to proceedings wholly within the juvenile court should be reserved for decision in a case that presents that specific factual context. Such a case might arise where the State files a second delinquency petition against a minor who has successfully defended on the merits against a prior petition alleging the same conduct or offense. *Cf. Richard M. v. Superior Court,* 4 Cal. 3d 370, 93 Cal. Rptr. 752, 482 P.2d 664 (1971) [dismissal of first petition held to be equivalent of an acquittal; double jeopardy thus held to bar further hearing on same act and offense by same minor]. *See also Winters v. New York,* 333 U.S. 507, 510 (1948).

Established principles of constitutional adjudication favor the approach of avoiding in this forum the broader issue decided by the Ninth Circuit. Ever since *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792), this Court has followed a policy of strict necessity in disposing of constitutional issues. *Rescue Army v. Municipal Court,* 331 U.S. 549, 568 (1947). See also *Broadrick v. Oklahoma,* 413 U.S. 601, 611 (1973). Thus, it has been the usual custom of this Court to avoid deciding constitutional questions unnecessary to a decision of the case at bench. *Alexander v. Louisiana,* 405 U.S. 625, 633 (1972); *Burton v. United States,* 196 U.S. 283, 295 (1905). *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Indeed, this Court has stated that it will

not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied." *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration,* 113 U.S. 33, 39 (1885). No matter how much the parties may favor the settlement of an important question of constitutional law, broad considerations of the exercise of judicial power prevent such determinations unless actually compelled by litigation before the Court. *Barr v. Matteo,* 355 U.S. 171, 172 (1957).

The requirement of a live case or controversy under Article III of the Constitution may make these principles of restraint a constitutional imperative in this case. As was observed in *Poe v. Ullman,* 367 U.S. 497, 503 (1961), the rules of strict necessity ". . . have derived from the historically defined, limited nature and function of courts and from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." Representing the interests of the State of California in this case, petitioner Breed cannot be said to be a truly "adversary" party on the question of whether double jeopardy applied to proceedings wholly within the juvenile court. The California Supreme Court has already determined that double jeopardy is applicable in proceedings before the juvenile court. *Richard M. v. Superior Court,* 4 Cal. 3d 370, 93 Cal. Rptr. 752, 482

P.2d 664 (1971). Since that holding was based on the California Constitution as well as the Fourteenth Amendment (*id.* at 375, 93 Cal. Rptr. at 756, 482 P. 2d at 668), petitioner Breed's interest in resolving this broader issue in this forum would be more academic than adverse. Regardless of the outcome in this Court, petitioner will be bound by the decision of California's highest court interpreting the California Constitution.

The limited nature of the issue before this Court having thus been demonstrated, there remains the critical question of the analysis to be employed in resolving that limited issue. As Professor Carr has observed:

> ". . . [a] more difficult analysis is necessary to determine the reach of double jeopardy doctrine into practices which are unique to the juvenile court and for which there are no functional equivalents in adult prosecutions. . . .
>
> "The issues become most complex upon consideration of the double jeopardy implications of the juvenile court's decision to refer the juvenile for prosecution as an adult. Because of its unique attributes and impact, this decision must not be resolved by a reflexive and unreflective application of the double jeopardy prohibition against successive prosecutions. Despite the ease with which double jeopardy doctrines apply to simple re-prosecution as a delinquent, trial as an adult after a delinquency proceeding is not amenable to a simplistic analysis. To resist the temptation to impose the double jeopardy prohibition automatically in the complex context of referral for adult prosecution, it is necessary to stress the

> importance and impact on the juvenile of the decision to try him as an adult. Most important, the actual consequences and impact of his interests and those of the juvenile court must be clearly perceived. The Supreme Court may well discover that the resolution of these issues is more difficult than the problems encountered during its earlier efforts at constitutional domestication." Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings,* 6 U. Tol. L. Rev. 1, [illegible] (1974).

Petitioner Breed submits that the resolution of the issue presented here—whether due process requires that pretransfer delinquency proceedings in juvenile court be treated as a prior jeopardy—can only be accomplished by the balancing of two important, but competing interests. The first is the interest of the juvenile in being treated with fundamental fairness at all levels. This interest can best be analyzed by superimposing the established principles of double jeopardy on the transfer process (1) to see if the policies behind the Sixth Amendment guarantee apply and (2) to determine whether any of the recognized exceptions to the application of double jeopardy are apparent.

The second interest which must be considered is the effect which the application of double jeopardy to transfer proceedings would have on "the juvenile court's assumed ability to function in a unique manner." *McKeiver v. Pennsylvania, supra,* 403 U.S. at 548. Although the issue is the nature of due process to be accorded in adult criminal court, the Court should not overlook the possibility that its decision may have a collateral, yet significant effect on the future operations of the juvenile court. That effect should be considered in assessing the jeopardy consequences of pretransfer delinquency proceedings, especially since a juvenile court delinquency proceeding is only "comparable in seriousness to a felony prosecution" but has not yet been fully equated to it. *In re Gault, supra,* 387 U.S. at 36. A final reason why this consideration is important is this Court's expressed reluctance "to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young. . . ." *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547.

Since respondent Jones claims that double jeopardy barred his trial and conviction as an adult as distinguished from a second proceeding in juvenile court, the factual context of this case does not present the proper occasion for deciding whether the double jeopardy clause of the Fifth Amendment is "fully applicable to juvenile proceedings." As will be presently shown, even if it were assumed that jeopardy attached at some point during the juvenile proceedings prior to transfer, the transfer procedure involved here did not violate the proscription against double jeopardy as explicated in the decisions of this Court. Furthermore, the application of double jeopardy to preclude a juvenile's trial as an adult after transfer would, in effect, prohibit the use of transfer as a dispositional alternative in all future cases. Such an effect would be so detrimental to the juvenile court's ability to function in its unique manner that due process should not require this result.

II

The Proscription Against Double Jeopardy Is Not Violated by a Transfer of a Juvenile for Trial as an Adult After a Delinquency Adjudication in Juvenile Court

The procedure of waiving jurisdiction and ordering an adult criminal trial is *sui generis* to the juvenile court. Having no analogue in adult proceedings, this unique transfer procedure violates none of the policies served by the Fifth Amendment guarantee against double jeopardy. Insofar as it is similar to any aspects of double jeopardy as applied in criminal cases, it presents an exceptional situation where a second trial would be permitted.

A. The Transfer Procedure Violates None of the Policies Behind the Double Jeopardy Proscription

This Court has stated that the Fifth Amendment guarantee against a defendant's being placed "twice in jeopardy" furthers three separate constitutional policies: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). An analysis of each of these three policies will demonstrate that none of them would be furthered by applying double jeopardy as a bar to the adult criminal trial of a juvenile in the transfer situation presented here.

The classic formulation of the first policy, which forbids reprosecution after acquittal, was set forth by this Court in *Green v. United States,* 355 U.S. 184, 187-88 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Certainly this policy is not offended under the facts of this case. Since the juvenile court sustained the allegations of the delinquency petition in respondent Jones' case, its action is more comparable to a conviction than an acquittal. Even more importantly, Jones' trial as an adult was not a repeated attempt to convict which enhanced "the possibility that even though innocent he [might] be found guilty." The State had already established respondent Jones' "guilt" beyond a reasonable doubt at the adjudicatory hearing in juvenile court. (*See* App. pp. 17-19.) Indeed, far from being a repeated attempt to convict, Jones' trial as an adult gave him a second opportunity to avoid liability for his criminal act. As one commentator has observed in this context, "[t]he juvenile, not the state, has a second bite at the apple of acquittal." Carr, *supra,* 6 U. Tol. L. Rev. at 45. Since the Fourteenth Amendment

does not require that delinquency hearings conform to all the requirements of a criminal trial (*In re Gault, supra,* 387 U.S. at 30-31), Jones' second trial as an adult served the salutary purpose of affording him the additional constitutional guarantees, such as jury trial, to which he was not entitled when the facts were found adversely to him in juvenile court.

The second policy underlying the Fifth Amendment guarantee against double jeopardy is that it protects against a second trial for the same offense after conviction. This policy was expressed in *United States v. Ball,* 163 U.S. 662, 669 (1896) as follows:

> ". . . The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, *whether convicted or acquitted,* is equally put in jeopardy at the first trial." (Emphasis added.)

Hence double jeopardy bars a second conviction because a second conviction creates a risk of a second punishment for the same offense. In *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 173 (1874), Mr. Justice Miller, writing for the Court, used precisely this rationale to explain why reprosecution was barred following a conviction:

> ". . . Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it it not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution."

The risk of double punishment for the same offense is the only reason given by the drafters of the Model

Penal Code for barring a second prosecution where a former prosecution resulted in a conviction. *Model Penal Code* § 1.09(3), Comment (Tent. Draft No. 5, 1956). The comment in support of this provision of the Model Penal Code states:

> "There need be no inquiry as to whether the judgment of conviction is on the merits. The reason is that so long as the judgment remains unreversed and not vacated, the defendant is subject to punishment pursuant to it and ought not, while it stands, be subjected to a subsequent prosecution for the same offense." (*Id.* at 51.)

The only case cited in *North Carolina v. Pearce, supra,* 395 U.S. at 717 n. 12, as reflecting the double conviction aspect of the Fifth Amendment double jeopardy guarantee was *In re Nielsen,* 131 U.S. 176 (1889). That case does not indicate in any way that a double conviction, absent the risk of double punishment, is violative of the Fifth Amendment. Indeed, the *Nielsen* case is really an apt illustration of how double jeopardy operates to prohibit multiple convictions imposing multiple punishments for the same offense. *Nielsen* arose under the statutes enacted by Congress to suppress polygamy in the Utah Territory. In two separate indictments, returned on the same day, Nielsen was charged respectively with unlawful cohabitation and adultery. He pleaded guilty to the unlawful cohabitation charge and was sentenced for it. After serving this sentence, the adultery indictment came on for trial. The trial court rejected Nielsen's plea that the unlawful cohabitation conviction barred his conviction of this offense as well. Nielsen received a second prison sentence upon his conviction for adultery. This Court concluded that the unlawful cohabitation conviction in-

cluded the adultery charged in the second indictment and held that "To convict and punish him for that also was a second conviction and punishment for the same offense." (*Id.* at 187.)

As thus delineated, the double conviction protection afforded by the Fifth Amendment has no application here. No case decided by this Court has applied that rationale where the threat of a second conviction was not also accompanied by the concomitant risk of a second sentence. In this case, respondent Jones never faced the risk of more than one punishment. At the outset of delinquency proceedings, he faced the risk that the juvenile court might waive jurisdiction as its disposition of his case. The risk of waiver included, ultimately, the risk of a criminal sentence. In addition, once criminal proceedings began, Jones faced no threat of further juvenile court action bearing any similarity to a sentence. California Welfare and Institutions Code section 707 required the juvenile court to dismiss the petition so that no further disposition could be made. That procedure was followed here.

It should also be noted that the rule prohibiting reprosecution after conviction serves a secondary purpose which has been expressed by one commentator in these terms:

> ". . . Without the rule the prosecution could continue to prosecute until he found a judge willing to give an 'appropriate' sentence. And if the subsequent judge imposed his sentence cumulatively the defendant would be punished twice for the same offense. The double jeopardy rule forces the prosecutor to accept the first judge's decision on sentencing just as he must accept the first jury's verdict on guilt." Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 278 (1965).

The transfer procedures at issue in this case do not permit the prosecutor to shop around for a sentence that suits him. Only one disposition is possible: either a criminal sentence if the juvenile court waives jurisdiction and conviction follows, or placement in a facility or program available to the juvenile court if waiver is inappropriate. In either case, the juvenile court judge, and not the prosecutor, determines the alternative to be pursued.

The third policy embodied in the double jeopardy clause prohibits multiple punishments for the same offense. If there is any distinction between this policy and the policy forbidding reprosecution after conviction, it is that the latter policy operates where the risk of double punishment arises while the former comes into play when the risk becomes an actuality. This distinction is often blurred in the cases. It is readily apparent, however, that no problem of multiple punishment is involved in the transfer of a juvenile to adult court for trial. At the conclusion of criminal proceedings, only a single sentence can be imposed. In this regard, the transfer does not violate double jeopardy for the same reason that a preliminary hearing has no such effect; no punishment can accrue as the result of either proceeding. *See Carr, supra,* 6 U. Tol. L. Rev. at 45. *See also Collins v. Loisel,* 262 U.S. 426, 429 (1923).

Finally, it must be acknowledged that the transfer process subjects defendants, such as respondent Jones, to the ordeal of more than one trial. Yet a second trial, in and of itself, has never been held to violate double jeopardy without its having also violated one of the three policies discussed above. As this Court has observed in the mistrial context, "[t]he double-jeopardy provision of the Fifth Amendment . . . does not mean

that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade v. Hunter,* 336 U.S. 684, 688 (1949). A similar rule should obtain where juvenile proceedings result in a transfer rather than a final judgment.

B. At Most, the Transfer Procedure Involves a Single, Continuing Jeopardy.

In upholding the prosecution's right to retry an accused after a reversal on appeal, this Court has ". . . formulated a concept of continuing jeopardy that had application where criminal proceedings against an accused have not run their full course." *Price v. Georgia,* 398 U.S. 323, 326 (1970). In the instant case, it is obvious that the proceedings against respondent Jones did not "run their full course" at the point the juvenile court waived jurisdiction; those proceedings were merely transferred to another forum in which his case was pursued to its conclusion. By analogy then, it should logically follow that respondent Jones' criminal trial was constitutionally permissible under the "continuing jeopardy" principle.

This view was the approach adopted by the California Court of Appeal and the United States District Court when this case was before each of them. (*See* Appendices B and C to Pet. for Cert.) The California Court of Appeal observed:

> ". . . [n]o *new* jeopardy has arisen by the proceedings sending the case to the criminal court. The entire Juvenile Court Law contemplates a careful determination, on a case-by-case basis, as to the type of procedure most likely to protect society and to rehabilitate the minor. Under some

> circumstances, a minor will go from the criminal court to the juvenile court; in other cases he will go from the juvenile court to the criminal court. But, until one court or the other reaches a final disposition of the case, only a single jeopardy is involved." *In re Gary Steven J.*, 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185, 1972). (Footnote omitted.) *See* Appendix C to Pet. for Cert., pp. 26-27.

Subsequently the California Supreme Court approved the Court of Appeal's application of the concept of continuing jeopardy to transfer proceedings. *Bryan v. Superior Court,* 7 Cal. 3d 575, 583, 102 Cal. Rptr. 831, 836, 498 P.2d 1079, 1084 (1972).

None of the reasons given by the Ninth Circuit for its rejection of the "continuing jeopardy" approach should be persuasive in this forum. The Ninth Circuit distinguished this case from the traditional continuing jeopardy cases by stating:

> "First, the trial in adult court does not follow as a result of an appeal taken by the minor from his juvenile court conviction, but is a retrial for the same offense initiated by the state. Continuing jeopardy allows retrial following an appeal initiated by the defendant claiming error in his first conviction. If the conviction is reversed, retrial must be in the same court as the first trial." *Jones v. Breed, supra,* 497 F.2d at 1167. *See* Appendix A to Pet. for Cert., p. 13.

In the foregoing passage, the Court of Appeals does little more than confine the "continuing jeopardy" principle to the narrow factual context on which it was developed. It is, however, the genius of our common

law system that old principles may be applied to new, but analogous situations as the occasion arises. When reasoning thus by analogy, one can hardly expect the old factual situation to be identical to the new context to which the enduring principle is applied. If it were otherwise, there would be no growth of the law, merely the application of static principles to repetitious fact patterns. As Mr. Justice McKenna once aptly stated:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions." *Weems v. United States,* 217 U.S. 349, 373 (1910).

What is important here is that the juvenile court transfer procedure bears sufficient similarity to the retrial-after-appeal situation as to permit the application of common principles. The fact that some details of the unique juvenile procedure do not dovetail perfectly with the retrial model is immaterial. As one commentator astutely put the matter:

> "The Ninth Circuit's reading of the cases upon which it relies, though technically correct, can arguably be faulted as 'the application of [a] mechanical formula . . .' to determine double jeopardy questions. The distinguishing factors—new charge, new court—between the transfer situation and previously decided continuing jeopardy cases raise rather than answer the question of the impact of the double jeopardy clause. When these differences appear, the issue becomes whether the

> exception is limited only to situations in which equivalent facts are replicated. Certainly the fact that the criminal trial is upon a new charging document cannot be crucial as any charging paper is merely notice of the offense which the state will attempt to prove against the defendant. As such, charging papers may often be amended, withdrawn, re-filed or otherwise altered during the course of a proceeding. In the transfer context, the crucial factor is that the offense charged remains the same in both courts. The form in which the charge is made should have no double jeopardy significance as it does not in other contexts in which trial on a new indictment is allowed." Carr, *supra,* 6 U. Tol. L. Rev. at 43-44

The Supreme Judicial Court of Massachusetts has employed similar reasoning in holding that the dismissal of the juvenile complaint as part of a transfer does not preclude the application of the continuing jeopardy doctrine. The court stated:

> ". . . To be sure, the juvenile complaint is dismissed. However, by statute an adult complaint must be issued forthwith. G.L. c. 119, §75. The dismissal of the juvenile complaint and the issuance of an adult complaint are contemplated by the statute (G.L. c. 119, § 75) to be in effect one event, and, as such, any jeopardy to which a juvenile was initially subjected under the juvenile complaint continues under the adult complaint." *In re a Juvenile,* Mass. , , 306 N.E.2d 822, 829 (1974).

Nor does the fact that the second trial takes place in a different court make a significant difference. If

the judgment in a criminal case is reversed because of inflammatory pretrial publicity, double jeopardy would not appear to bar a retrial in a court of a different county if community hostility toward the defendant had not abated. Nor would it appear to bar retrial in a different court where a reversal was based on a finding of judicial misconduct so flagrant that there was every likelihood of its recurrence at a second trial before the same judge. In any event, a difference in the trial forum is hardly critical for double jeopardy purposes so long as the proceedings in the first court ". . . have not run their full course." *Price v. Georgia, supra,* 398 U.S. at 326.

In addition, it should be noted that *continuing* jeopardy does not mean *continuous* jeopardy. In the cases involving retrial after appellate reversal, the defendant is not in continuous jeopardy from the moment jeopardy attaches at his first trial until entry of judgment at the second trial. There is a gap in jeopardy between the date of reversal and the date of empaneling of the jury at his second trial. If it is assumed that jeopardy attached at some point during the delinquency proceedings, there was a similar gap in jeopardy between the moment of transfer and the attachment of jeopardy at respondent Jones' criminal trial. At the intervening preliminary hearing, respondent Jones was not in jeopardy. *Collins v. Loisel,* 262 U.S. 426, 429 (1923). Such a gap in jeopardy does not, however, defeat the application of the continuing jeopardy principle since the crux of the principle is that the second trial involve no new jeopardy.

Therefore, even if one assumes that jeopardy attached at some point prior to transfer, respondent Jones' trial as an adult was not prohibited by the

Sixth Amendment guarantee against double jeopardy because he faced the possibility of only a single criminal sentence from the inception of juvenile proceedings until the entry of judgment in superior court. Such a case is properly within the principle of continuing jeopardy. Indeed, the Ninth Circuit implicitly recognized this principle in its remand order to the district court:

> "We reverse with directions for the district court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either to set him free or remand him to the juvenile court for disposition." *Jones v. Breed, supra,* 497 F.2d at 1168. *See* Appendix A to Pet. for Cert., p. 15.

The possibility of a further disposition in juvenile court reflects at least a subconscious awareness that the pretransfer proceedings in juvenile court had not "run their full course." The possibility of such further dispositional proceedings is clearly inconsistent with a holding that there was a completed prior jeopardy which barred the adult prosecution.

C. This Case Does Not Violate the Rule of Waller v. Florida.

In *Waller v. Florida,* 397 U.S. 387 (1970), this Court held that double jeopardy barred the successive prosecution of a defendant in a state court when he had previously been tried for the same offense in municipal court. The Ninth Circuit felt that *Waller* required the application of double jeopardy in this case:

> ". . . transfer following the adjudicatory hearing would essentially allow the minor to be tried for one offense in two courts created by the same state in violation of the principles enunciated in Waller

v. Florida and Ashe v. Swenson. The juvenile courts are a separate court system from the adult courts and once a minor has been placed in risk of conviction he cannot be retried. Although trial in both the juvenile and the adult court may not result in separate punishment, double jeopardy protects [*sic*] double risk of conviction, not just double risk of punishment." *Jones v. Breed, supra,* 497 F.2d at 1167. *See* Appendix A to Pet. for Cert., pp. 13-14.

Petitioner Breed submits that *Waller v. Florida* is readily distinguishable from the instant case. Most importantly, *Waller* did not involve a transfer from one court to another. Professor Carr of the University of Toledo College of Law succinctly delineates the importance of this difference:

". . . In *Waller* there was no decision in the first court that additional proceedings should commence in a second court. There was no judicial decision bridging the gap between courtrooms, as there is in the transfer situation. Rather, there was a unilateral prosecutorial decision, which followed completion of clearly independent proceedings in the first court. The decision of the prosecuting attorney to indict Waller did not depend upon prior judicial action or concurrence. In the transfer context, no criminal prosecution can occur without the consent of the juvenile court judge embodied in a transfer order." Carr, *supra,* 6 U. Tol. L. Rev. at 44.

In *Waller* the apparent reason for the felony indictment was to obtain a greater sentence than that already imposed in the municipal court. This effort to obtain

cumulative punishments clearly violated the multiple punishment prohibition of the double jeopardy clause. In its opinion, the Ninth Circuit acknowledged that trial in both the juvenile and adult courts would not result in separate punishment. *Jones v. Breed, supra,* 497 F.2d at 1167. *See* Appendix A to Pet. for Cert., p. 13.

III

The Application of Double Jeopardy to Preclude Transfer as a Dispositional Alternative Would Have an Adverse Effect on the Juvenile Court's Ability to Function in Its Unique Manner

In its decisions applying due process to juvenile court proceedings, this Court has evinced concern that the application of a particular right in this setting should not impair the ability of the juvenile court to pursue the goals which led to its creation and separate existence. Most recently, in *McKeiver v. Pennsylvania,* 403 U.S. 528, 545 (1971), this Court concluded that due process did not require trial by jury at the adjudicative stage of juvenile court proceedings. The interests served by the right to a jury trial were held to be outweighed by the fact that:

". . . The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function, and would contrarily, provide an attrition of the juvenile court's ability to function in a unique manner." *Id.* at 547.

A similar balancing approach should be applied in this case should this Court conclude that the principles of Fifth Amendment double jeopardy would otherwise bar a transfer to adult court after a delinquency ad-

judication. Although respondent Jones was entitled to the "twice in jeopardy" protection of the Fifth Amendment at his criminal trial, the resolution of the double jeopardy issue presented here will have a profound effect on future juvenile court proceedings. If double jeopardy were held to prohibit a juvenile's trial as an adult in all cases where an adjudication of delinquency had been commenced or completed prior to transfer, such a holding would effectively mandate transfer prior to the adjudicatory hearing or not at all. Conversely, such an application of double jeopardy in adult proceedings would abrogate the use of transfer as one of the dispositional alternatives open to the juvenile court after a finding of delinquency. Petitioner Breed submits that this result would diminish the fiexibility and informality of juvenile court proceedings without conferring any additional due process benefits upon juveniles charged with delinquent acts.

A. A Cumbersome Preliminary Hearing Procedure Would Be Engrafted Onto the Juvenile Court Structure

The National Advisory Commission on Criminal Justice Standards and Goals has recently reported:

> "There is general agreement that there are some juveniles for whom the special features of juvenile cases are not appropriate. The family court should have authority to transfer those cases to the trial court of general jurisdiction or the criminal division of that court, where the juvenile will be prosecuted as an adult. This authority exists in today's juvenile courts, although it is sometimes described as the power to transfer the case to adult court, to certify a case to adult court or to waive the juvenile court's jurisdiction. The Commission

> believes that the family court with jurisdiction over delinquent juveniles should have this authority." National Advisory Commission on Criminal Justice Standards and Goals, *Report on Courts*, Commentary to Standard 14.3, p. 300 (1973).

There also appears to be general agreement that double jeopardy would be no bar to transfer if the transfer or fitness hearing preceded the hearing on the merits of the delinquency petition. *See, e.g.*, Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 Wm. & Mary L. Rev. 266, 300 (1972); Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. Rev. 1, 24-25 (1974). Under these circumstances, the transfer or fitness hearing would be analogous to a preliminary hearing in adult criminal proceedings because no disposition similar to a sentence could result from such a hearing. It is well established that jeopardy does not attach at a preliminary hearing. *United States v. Levy*, 268 U.S. 390, 393 (1925); *Collins v. Loisel*, 262 U.S. 426, 431 (1923). The fact that a pre-adjudication transfer hearing would clearly avoid any double jeopardy problem does not, however, mean that transfer should be limited to that stage of the proceedings. As Mr. Justice Cardozo had occasion to remark in the criminal setting, a state's "procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In the instant case, elimination of transfer as a dispositional alternative would be neither fairer nor wiser nor would it necessarily give surer protection to the minor who stands to lose the benefits of treatment as a juvenile.

If transfer is barred as a dispositional alternative to probation or placement in a juvenile facility, states such as California must adopt a preliminary hearing procedure in all juvenile court cases to determine *at the outset* (1) whether the minor alleged to be delinquent is amenable to treatment as a juvenile or (2) whether he should be tried as an adult. Such a procedure is reminiscent of the command of the Red Queen in Lewis Carroll's *Alice in Wonderland:* "Sentence first—verdict afterward." As one commentator has expressed this point:

> "A problem created by the conclusion that double jeopardy applies to juvenile court proceedings is that the necessity of deciding whether to waive jurisdiction to the criminal court before the question of guilt is determined may hinder the desirable procedure of the juvenile correctional system. This problem arises because of the accepted principles that the offender should be waived to criminal court only after a social study to determine that he cannot be adequately treated in the juvenile court system, and that no social study should be conducted prior to determination that the accused is guilty of the alleged offense. Obviously, the juvenile court judge can make an intelligent decision regarding waiver only after a social study has been conducted. But a social study, which in many ways resembles a pre-sentence investigation in criminal procedure, may seriously harm a child's reputation, as well as that of his parents, and the innocent child should be protected against such possible stigma and invasion of his privacy whenever possible." Note, *Double Jeopardy Applied to Juvenile Proceedings,* 43 Minn. L. Rev. 1253, 1257-58 (1959). (Footnotes omitted.)

A preliminary fitness or transfer hearing would require the juvenile court judge to focus on disposition considerations before there has been an adjudicatory hearing on jurisdiction ("guilt"). The California Supreme Court has pointed out the basic unfairness of this approach in holding that the juvenile court commits reversible error under state law by reviewing the probation officer's social study report on disposition before determination of the issue of jurisdiction. The court has stated:

> "The history of [California] Welfare and Institutions Code sections 701, 702, and 706 clearly indicates that the Legislature intended to create a bifurcated juvenile court procedure in which the court would first determine whether the facts of the case would support the jurisdiction of the court in declaring a wardship and *thereafter* would consider the social study report at a hearing on the appropriate disposition of the ward. This procedure affords a necessary protection against the premature resolution of the jurisdictional issue on the basis of legally incompetent material in the social report." *In re Gladys R.,* 1 Cal. 3d 855, 859-60, 83 Cal. Rptr. 671, 674-75, 464 P.2d 127, 130-31 (1970). (Brackets added; footnotes omitted.)

The purpose of requiring separate considerations of wardship and of disposition was to prevent the court from being affected, at the first stage, by evidence of the minor's character not relevant to the determination of his "guilt." *In re Gary Steven J.,* 17 Cal. App. 3d 704, 708, 95 Cal. Rptr. 185, 188 (1971). To avoid this potential for prejudice if preliminary fitness hearings were mandatory, the judge who presided at the

preliminary fitness hearing would have to be disqualified from sitting at the subsequent jurisdictional hearing if the minor was found to be amenable to treatment as a juvenile. *See Donald L. v. Superior Court*, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853, 498 P.2d 1098, 1101 (1972). The statutes of three ~~stages~~ states require the reassignment of the case to a second judge whenever transfer is rejected at the outcome of a preliminary fitness hearing. Fla. Stat. Ann. § 39.09(2)(g) (1974); Tenn. Code Ann. § 37-234(e) (Supp. 1973); Wyo. Stat. § 14-115.38(c) (Supp. 1973).

Thus, the preliminary fitness or transfer hearing will add a third hearing in every juvenile court case where transfer is considered and rejected, whereas only two hearings—jurisdiction and disposition—need be held if transfer may constitutionally be treated as a dispositional alternative. Adding to delay at the very least will be the requirement that a different judge preside at the fitness and jurisdiction hearings. These additional burdens on the resources of the juvenile court can only serve to increase already overcrowded dockets. One study has concluded:

> "All available evidence shows that most juvenile courts face a continuing overload stituation, in which they cannot handle more than a small proportion of all potential cases because of resource and manpower limitations." Vinter, "The Juvenile Court as an Institution," in Appendix C to President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 87 (1967).

The magnitude of the increased burden of having different judges preside at fitness and jurisdiction

hearings can only be suggested because petitioner has been unable to discover any published statistics on the number of delinquency cases in which the question of transfer is considered. The problem will probably be most acute in smaller counties where only a single judge presides over the juvenile court in addition to other duties. But even in multi-judge urban counties, the problem would doubtless be substantial. In Los Angeles County during 1974, for example, there were only five superior court judges and 24 commissioners sitting as referees in the juvenile court. This limited staff processed 14,094 delinquency petitions in 1972. Bureau of Criminal Statistics, Calif. Dept. of Justice, *Crime and Delinquency in California, 1972—Reference Tables: Adult and Juvenile Probation*, Table 31, p. 98 (1973).

Furthermore, the preliminary fitness hearing cannot be too preliminary—in the sense of being summary—if it is to be fair. Under California law, the nature of the crime allegedly committed, the circumstances and details surrounding its commission, and the minor's degree of sophistication in relation to criminal activities are factors which may be considered by the juvenile court in the exercise of its discretion to certify a minor to the superior court as not amenable to treatment as a juvenile. *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 715-16, 91 Cal. Rptr. 600, 604, 478 P.2d 32, 36 (1970). Three other states specifically require a finding of delinquency before the juvenile court can transfer the case. Ala. Code Tit. 13, § 364 (1958); Mass. Dist. Ct. R. 85A (1974); W. Va. Code Ann. § 49-5-14 (1966). The District of Columbia statute, which this court examined in *Kent v. United States*, 383 U.S. 541 (1966). contained a requirement that the juvenile court must conduct a "full investigation" before order-

ing a transfer. D.C. Code § 11-914 (1961), now § 11-1553 (Supp. 1965). Several other statutes also require that an "investigation" or a "full investigation" precede transfer. *See* Ala. Code, Tit. 13, § 364 (1958); Idaho Code § 16-1806 (Supp. 1971); Hawaii Rev. Stat. § 571-22 (1973); Ind. Ann. Stat. § 9-3214 (Supp. 1972); Mich. Comp. Laws Ann. § 712A.4 (Supp. 1972); Miss. Code Ann. § 7185-15 (1953); Nev. Rev. Stat. § 62.080 (1969); N.H. Rev. Stat. Ann. § 169.21 (1964); Okla. Stat., Tit. 10, § 1112(b) (1971); R.I. Gen. Laws Ann. § 14-17 (Supp. 1971); W.Va. Code Ann. § 16.1-176 (Supp. 971).

These judicial and statutory criteria for transfer indicate that pre-adjudication transfer hearings will not necessarily be short, inconsequential additions to present juvenile court calendars. Indeed, it is reasonable to expect that these hearings will be as vigorously contested as any hearing on the merits of the delinquency petition because in these proceedings the minor stands to lose the unique benefits of treatment as a juvenile. For this reason, the National Advisory Commission on Criminal Justice Standards and Goals has contemplated a full-dress, adversary hearing on the issue of transfer:

> "No order directing trial as an adult should be entered unless the family court has held a full and fair hearing on the matter. The prosecutor should have the authority to request that a case be tried as an adult prosecution, but the family court should be able to raise the matter as well. At the hearing, the juvenile should be accorded substantially the same rights as an adult, except that the decision should not be made by a jury. Thus the juvenile should be represented by counsel, have access to all of the information considered by the court, have the right to confront and cross-examine those testifying in favor of processing the case as an adult prosecution, and have the right to present evidence against having the case so processed." *Report on Courts, supra,* Commentary on Standard 14.3, pp. 300-301.

Moreover, in states like California, the juvenile courts will essentially have to conduct two full trials before two different judges in each case where the issue of transfer is resolved in favor of the minor prior to the adjudication hearing. Under *Jimmy H. v. Superior Court, supra,* 3 Cal. 3d at 715-16, 91 Cal. Rptr. at 604, 478 P.2d at 36, the juvenile court may consider the nature of the crime allegedly committed, the circumstances and details surrounding its commission, and the minor's degree of sophistication in relation to criminal activities. Although the question of guilt or innocence *per se* is not before the juvenile court at the transfer hearing (*see Brown v. Cox,* 481 F.2d 622, 631 [4th Cir. 1971]), consideration of the foregoing factors will necessarily involve the presentation of much of same evidence which both sides would normally introduce at the hearing on the merits of the delinquency petition. Only by hearing such duplicative evidence can the juvenile court make an informed determination as to whether the offense is so premeditated, willful, aggravated or heinous that the minor should lose the benefits of a juvenile court disposition.

Of course, the juvenile court can avoid such obviously duplicative hearings by conducting less than a full investigation into the propriety of transfer. A number of states permit transfer solely on a finding of

probable cause to believe that the minor has committed the delinquent conduct alleged in the petition. *See* Rudstein, *supra,* 14 Wm. & Mary L. Rev. at 298-99 n. 132. Use of such a standard obviates the need to resolve conflicts between the evidence presented by the prosecution and defense. It enhances the ability of the prosecution to select the forum in which the juvenile will be tried. It also increases the risk that innocent minors will be tried as adults in response to community pressure. *See* Carr, *supra,* 6 U. Tol. L. Rev. at 79-80. Even if the minor is found amenable to treatment through the facilities available to the juvenile court, the lack of a "full investigation" heightens the probability that some minors will be retained in the juvenile court system who would have been screened out by a more thorough transfer hearing. These youths may frustrate the rehabilitation of other minors by their very presence in the system, and they may prove a threat to the proper functioning of juvenile institutions in other ways. Thus, the vice of a truncated, preliminary fitness hearing is that it is fraught with the increased potential for critical mistakes regardless of the outcome of the transfer hearing. More importantly, since the minor may not receive the full and fair hearing which this Court contemplated in *Kent v. United States,* 383 U.S. 541 (1966), such summary procedures may offend due process.

Therefore, if double jeopardy mandates that the question of transfer must inflexibly be considered at a hearing preliminary to the adjudication of delinquency, the proponents of this view must confront an inescapable dilemma. On the one hand, if they argue that the preliminary fitness hearing will be a short affair consuming little additional court time, this alternative will present the danger that the hearing will be so abbreviated as to offend due process while minimizing the ability of the juvenile court to screen out through the transfer mechanism youths who should not be in its rehabilitative programs. On the other hand, if the preliminary fitness hearing is conducted as it should be, it will essentially duplicate much of the testimony and other evidence that would be presented at the hearing on the merits of the delinquency petition. In this latter event, the application of double jeopardy to compel this result will ". . . burden the juvenile courts with a procedural requirement that will make juvenile adjudications significantly more time-consuming, or rigid." *In re Winship,* 397 U.S. 358, 375 (1970) (concurring opinion of Mr. Justice Harlan). On balance, neither alternative affords the juvenile court the flexibility it possesses where transfer may be used as a dispositional alternative. As in the present case, a single judge may acquaint himself with the nature of the crime and the circumstances surrounding its commission at the adjudicatory hearing. Having the benefit of the knowledge gained at the adjudicatory hearing, the judge may consider the question of transfer in a manner less time-consuming and more consistent with the ends of due process and the juvenile court system.

B. The Weight of Authority Favors Transfer as a Dispositional Alternative of the Juvenile Court

In both *Gault* and *McKeiver,* this Court considered existing state practices, as reflected by statutes and judicial opinions, in determining whether due process demanded the application of a particular constitutional right in the juvenile court context. *In re Gault, supra,* 387 U.S. at 37-38; *McKeiver v. Pennsylvania,* 402

U.S. at 548. Although the fact that a practice is followed by a large number of states is not conclusive as to whether that practice accords due process, this Court has held that it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Leland v. Oregon,* 343 U.S. 790, 798 (1962); *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934). It is therefore significant that the majority of states permit the transfer of a juvenile for trial as an adult after the point at which jeopardy would have attached under similar circumstances in criminal proceedings. The majority of courts and all of the states which have legislated on the subject treat transfer after the commencement of the adjudicatory hearing as an exception to double jeopardy.

At least 43 jurisdictions within the United States have provisions in their juvenile court statutes which permit waiver of jurisdiction over certain juveniles found unfit for treatment in the facilities available to the juvenile court. *See* Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 Wm. & Mary L. Rev. 266, 297 n.128 (1972). Of these jurisdictions, 28 states either make no mention of when transfer to the criminal courts can occur or expressly permit transfer after an adjudication of delinquency has begun. Ala. Code Tit. 13, § 364 (1958); Alaska Stat. § 47.10.060 (1971); Ariz. Juv. Ct. R. 12 (Supp. 1971); Cal. Welf. & Inst'ns Code § 707 (West Supp. 1972); Colo. Rev. Stat. Ann. §§ 22-1-4(4)(a), 22-3-8 (Supp. 1969); Conn. Gen. Stat. Ann. § 17-60a (Supp. 1972); Hawaii Rev. Stat. § 571-22 (Supp. 1973); Idaho Code § 16-1806 (Supp. 1974); Ind Ann. Stat. § 31-5-7-14 (Supp. 1973); Iowa

Code Ann. § 232-72 (1969); Kan. Stat. Ann. § 38.808 (1973); Ky. Rev. Stat. Ann. § 208.170 (1972); Me. Rev. Stat. Ann. Tit. 15, § 2611(3) (1964); Mass. Gen. Laws Ann. ch. 119, § 61 (1965); Mich. Stats. Ann. § 27.3178 (598.4) (Supp. 1974); Minn. Stat. Ann. § 260-125 (1971); Miss. Code Ann. § 7185-15 (1953); Mo. Ann. Stat. § 211.071 (1962) (as interpreted in *Carter v. Murphy,* 465 S.W.2d 28 [Mo. Ct. App. 1971]); Nev. Rev. Stat. § 62.080 (1969); N.J. Rev. Stat. § 2A; 4-48 (Supp. 1974); Okla. Stat. Tit. 10, § 1112 (1974); Ore. Rev. Stat. § 419.507 (1973); R.I. Gen. Laws Ann. § 14-1-7 (Supp. 1973); S.C. Code Ann. § 15-1281.13 (1962); S.D. Compiled Laws Ann. § 26-8-22.7 (Supp. 1971); Utah Code Ann. § 55-10-86 (1974); W.Va. Code Ann. § 49-5-14 (1966); Wis. Stat. Ann. § 48.18 (Supp. 1972). For double jeopardy purposes, it does not matter whether the delinquency hearing has been completed or merely commenced. If this hearing is compared to the criminal trial, jeopardy will have attached. A defendant is placed in jeopardy in a criminal proceeding once the defendant is put on trial before the trier of facts, whether the trier is a jury or a judge. *United States v. Jorn,* 400 U.S. 470, 479 (1971).

Five states, including the populous states of California and Pennsylvania, permit the juvenile court to waive jurisdiction after a finding of delinquency. Ala. Code Tit. 13, § 364 (1958) (as interpreted in *Seagroves v. State,* 279 Ala. 621, 189 So.2d 137 [1966]); Cal. Welf. & Inst'ns Code § 707 (West. Supp. 1972); Mo. Ann. Stat. § 211.071 (1962) (as interpreted in *Carter v. Murphy,* 465 S.W.2d 28 [Mo. Ct. App. 1971]); Ore. Rev. Stat. § 419.507 (1971); W.Va. Code Ann. § 49-5-14 (1966). Only 15 jurisdictions provide

that the fitness or transfer hearing must be held prior to a hearing on the merits of the delinquency petition. D.C. Code § 16-2307 (Supp. V 1972); Fla. Stat. Ann. § 39.09(2) (1974); Ga. Code Ann. § 24A-2501 (1971); Ill. Rev. Stat. ch. 37, § 702-7(3) (Supp. 1972); Md. Ann. Courts and Jud. Proc. Code § 3-816 (Supp. 1974); N.H. Rev. Stat. Ann. § 169.21 (1964); N.M. Stat. Ann. § 13-14-27 (Supp. 1973); N.C. Gen. Stat. § 7A-280 (1969); N.D. Cent. Code § 27-20-34 (1974); Ohio Rev. Code Ann. § 2151-26 (Page Supp. 1971); Pa. Stat. Ann. Tit. 11, § 50-325 (1974); Tenn. Code Ann. § 37-234 (Supp. 1971); Tex. Code Ann., Family Code, § 54.02 (1973); Va. Code Ann. § 16.1-176.2 (1973); Wyo. Stat. Ann. § 14-115.38 (Supp. 1971).

Those courts which have considered the issue have concluded that a criminal prosecution subsequent to an adjudication delinquency does not violate the protection against double jeopardy. *Bryan v. Superior Court,* 7 Cal. 3d 575, 580-83, 102 Cal. Rptr. 831, 834-36, 498 P.2d 1079, 1082-85 (1972); *In re Gary Steven J.,* 17 Cal. App. 3d 704, 709-10, 95 Cal. Rptr. 185, 189-90 (1971); *In re a Juvenile,* Mass. , 306 N.E.2d 822, 828-30 (1974); *Carter v. Murphy,* 465 S.W.2d 28, 31-32 (Mo. Ct. App. 1971); *In re Mack,* 22 Ohio App. 2d 201, 204, 260 N.E.2d 619, 621 (1970). *See also United States v. Dickerson,* 271 F.2d 487, 491 (D.C. Cir. 1959).

Thus, since the majority of jurisdictions permit the transfer of a juvenile for prosecution as an adult after the point at which jeopardy would normally attach in criminal proceedings, it cannot be said that the use of transfer as a dispositional alternative of the juvenile court is a practice which "offends some principle of

justice so rooted in "the traditions and conscience of" our people as to be ranked as fundamental." *Snyder v. Massachusetts, supra,* 291 U.S. at 105.

Insofar as this Court may consider the recommendations of experts and various model acts as bearing on the requirements of due process in this case, it should be noted that neither the Uniform Juvenile Court Act nor the Standard Juvenile Court Act prohibit transfer after an adjudication of delinquency. *See Uniform Juvenile Court Act* § 34(a), 9 Uniform Laws Ann. 429 (master ed. 1973) (approved by National Conference of Commissioners on Uniform State Laws and American Bar Association in 1968); *Standard Juvenile Court Act* § 13 (6th ed., 1959) (prepared by Committee on Standard Juvenile Court Act of the National Council on Crime and Delinquency, in cooperation with the National Council of Juvenile Court Judges and the U.S. Children's Bureau). While the Children's Bureau has recommended that double jeopardy bar reprosecution for the same conduct in juvenile court, its recommendation does not expressly encompass the transfer situation and thus cannot be read as taking a definite position against transfer as a dispositional alternative. W. Sheridan, *Legislative Guide for Drafting Family and Juvenile Court Acts,* § 27 and comment (Dept. of H.E.W., Children's Bureau Pub. No. 437-1966). Only the Model Rules for Juvenile Courts require resolution of the transfer issue before commencement of the delinquency adjudication hearing. *Model Rules for Juvenile Courts,* Rule 9 (National Council on Crime and Delinquency, 1969). Since no reason is given for this recommendation in Rule 9, this provision of the Model Rules may simply reflect cautious draftsmanship to avoid any potential double jeopardy

problems rather than any consideration of the better view in terms of fairness to the juvenile.

Furthermore, the Model Rules contain no indication as to why this rule is at variance with Section 13 of the Standard Juvenile Court Act, also prepared by the National Council on Crime and Delinquency.

In summary then, there is no trend in the statutes, case law, or the recommendations of experts that clearly favors the application of double jeopardy to preclude transfer as a dispositional alternative. If there is a trend, it is one favoring flexibility which would permit the juvenile court judge to consider transfer either before, during or after the adjudication hearing according to the demands of the particular case. In a case where the juvenile does not contest the allegations of delinquency, it may be appropriate to consider the question of transfer first. But in a case where the allegations of the delinquency petition are contested and where a preliminary fitness hearing will be lengthy and potentially duplicative, the juvenile court judge should not be constitutionally foreclosed from considering transfer as a dispositional alternative. No other result would be consistent with this Court's reluctance "to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young. . . ." *McKeiver v. Pennsylvania, supra,* 403 U.S. at 547.

Conclusion

For the foregoing reasons, petitioner Breed submits that respondent Jones' trial as an adult did not violate the Fifth Amendment guarantee against double jeopardy. Petitioner therefore urges that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

v.

GARY STEVEN JONES,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Gary Steven Jones, respondent herein, respectfully applies for permission to proceed in forma pauperis in connection with the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit previously filed by petitioner. Respondent's affidavit in support thereof is annexed hereto.

Dated: San Francisco, California
July 16, 1974

Respectfully submitted,

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By Robert L. Walker

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ALLEN F. BREED,
Petitioner,
v.
GARY STEVEN JONES,
Respondent.

No.

AFFIDAVIT OF GARY STEVEN JONES IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, GARY STENVE JONES, being first duly sworn according to law, depose and say in support of my application for leave to proceed without prepayment of costs or fees, as follows:

1. I am the respondent in the above-entitled case;

2. I am 21 years of age;

3. I am presently unemployed;

4. Because of my poverty I am unable to pay the fees and costs of said cause;

5. Similarly, because of my poverty, I am unable to give security for the same, or to pay for the cost of printing any briefs;

6. I have no present income and am on parole from the California Youth Authority;

7. In the proceedings below before the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, the aforementioned Courts permitted me to proceed in forma pauperis;

8. The nature of the cause is fully described in petitioner's petition for writ of certiorari previously filed with this Court;

9. I believe my case is meritorious and this application is not made for the purpose of delay;

10. My attorney, Robert L. Walker of the Youth Law Center, is serving without payment of any fees.

SUBSCRIBED AND SWORN TO
before me this 18th day of
July, 1974.

Notary Public

OFFICIAL SEAL
PETER B. SANDMANN
NOTARY PUBLIC-CALIFORNIA
SAN FRANCISCO COUNTY
My Commission Expires Sept. 23, 1975
795 Turk St., San Francisco, CA. 91102

/ Gary Steven Jones
Gary Steven Jones

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1974

No. 73-1995

ALLEN F. BREED,
Petitioner,
v.
GARY STEVEN JONES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1974
No.

ALLEN F. BREED,
Petitioner,
v.
GARY STEVEN JONES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported; it is annexed to the Petition for Writ of Certiorari [hereinafter "Petition"] as Appendix "A". The opinion of the United States District Court for the Central District of California is reported as Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972). The opinion of the California Court of Appeal, Second Appellate District, dismissing respondent's petition for a writ of habeas corpus, is reported as In re Gary Steven J., 17 C.A.3d 704, 95 Cal. Rptr. 185 (1971). The latter two opinions are annexed to the petition as Appendices "B" and "C", respectively.

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JURISDICTION

The jurisdictional prerequisites are adequately set forth at page two of the petition.

QUESTION PRESENTED

Whether respondent was twice placed in jeopardy, in violation of his rights under the Fifth Amendment to the United States Constitution, when he was tried in adult court in connection with the same offense for which he had previously been tried and adjudicated a delinquent by the juvenile court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the California Welfare and Institutions Code [hereafter "W&I"] are set forth at pp. 3-6 of the petition. The Fifth and Fourteenth Amendments to the United States Constitution are reproduced as Appendix "A", infra.

STATEMENT OF THE CASE

The pertinent facts, as well as the proceedings below, are adequately summarized in the opinion of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

This case presents a narrow issue. Respondent, Gary Steven Jones, was found by the juvenile court to be unamenable to the "care, treatment and training program available through . . . [its] facilities . . ." W&I §707. This determination was made after respondent had been subjected to a full trial in juvenile court on a charge of armed robbery and had been adjudicated a delinquent. Subsequently, respondent was remanded to adult court; he was there tried and convicted of the same armed robbery which had formed the basis for the juvenile court's prior adjudication.

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The Ninth Circuit's holding that this procedure contravened the double jeopardy prohibition of the Fifth Amendment is fully in accord with the decisions of this Court that a person may not be tried twice for the same offense.[1/] The Ninth Circuit's decision will not impede the juvenile court in any way. The sole effect of the decision is to require that the fitness decision be reached before the adjudicatory hearing in juvenile court. The California Supreme Court has stated in this regard:

> The usual practice as to a fitness hearing in many juvenile courts in this state is that followed in the case before us. A hearing on the issue is noticed and held before the jurisdictional hearing. This practice of deciding the issue of fitness at the very outset is recommended in the California Juvenile Court Benchbook (Cal. College of Trial Judges (1971) §1014, pp. 190-191) and we commend it. Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal. Rptr. 850, 853 (1972).

The Ninth Circuit's opinion does no more that harmonize the requirements of the federal Constitution with the usual and preferred practice in California. Even if this Court determined to grant certiorari and reverse the Ninth Circuit's decision, such a ruling would have no practical effect upon the present practice in the juvenile courts in California.

I

THERE IS NO CONFLICT BETWEEN DECISIONS OF THE CIRCUIT COURTS OF APPEALS

There is only one other Court of Appeals which has squarely faced the issue which the Ninth Circuit resolved in respondent's favor. In Fain v. Duff, 488 F.2d 218 (5th Cir. 1973), the Fifth Circuit ruled that the Florida procedure by which a minor

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1/ See, e.g., Waller v. Florida, 397 U.S. 387 (1970); Downum v. United States, 372 U.S. 734 (1963); Green v. United States, 355 U.S. 184, 187 (1957); Helvering v. Mitchell, 303 U.S. 391, 398 (1938); Kepner v. United States, 195 U.S. 100, 130 (1904); Ex parte Lange, 18 Wall 163, 169, 21 L. Ed. 872 (1873).

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was tried as a criminal after having been adjudged delinquent by a juvenile court violated the former jeopardy provision of the Fifth Amendment.

Petitioner attempts to argue that the decision of the United States Court of Appeals for the District of Columbia Circuit in United States v. Dickerson, 271 F.2d 487 (D.C. Cir. 1959), is in conflict with the opinions of the Fifth and Ninth Circuits. This is not true. In Dickerson the Court found that jeopardy had not attached during the juvenile proceedings because the minor's admission of guilt occurred at a preliminary hearing; was not a guilty plea; and was never accepted by the Court as a guilty plea. 271 F.2d at 491. Since the Court found that jeopardy had never attached during the proceedings in juvenile court, it never squarely confronted the issue of whether the minor had been twice placed in jeopardy.[2/]

The differing results in Dickerson, on the one hand, and Jones and Fain, on the other hand, are attributable to differences in their facts and in the manner in which the Courts construed the records. Such differences do not rise to the level of conflicting opinions among the Courts of Appeal as to underlying issues of double jeopardy law.

II

PETITIONER GREATLY EXAGGERATES THE EFFECTS OF THE NINTH CIRCUIT'S DECISION

Petitioner suggests that there are a large number of

2/ As the Ninth Circuit noted below, the Dickerson decision was pre-Kent, Gault and Winship. It is also important to note that Dickerson was decided prior to this Court's decision in Benton v. Maryland, 395 U.S. 784 (1969), holding that the double jeopardy protection is applicable to criminal proceedings in state courts. These latter cases vitiate the dicta in Dickerson that the double jeopardy clause does not apply to juvenile court proceedings.

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persons presently in California prisons who will be released if the Ninth Circuit's decision is permitted to stand. In support of this contention he cites statistics from the years 1969-1971 showing the number of persons under the age of twenty-one committed to California prisons.[3] There figures are highly misleading.

Effective March 4, 1972, the California Legislature passed the so-called Priolo Act, Cal. Stats 1971, chs. 1729, 1748, lowering the age of juvenile court jurisdiction to eighteen. Prior to that date juvenile and adult courts retained concurrent jurisdiction over persons between the ages of eighteen and twenty-one. However, the overwhelming practice throughout California was for persons over the age of eighteen to be arraigned and tried initially as adults. In a small percentage of the cases, the adult courts would remand the cases to juvenile courts under the power then vested in them by W&I §604.

Therefore, the vast majority of the 1035 eighteen to twenty-one year olds cited by petitioner never had petitions filed against them in juvenile court. They were initially tried as adults and were sentenced to state prison by the adult court. As for the remaining, extremely small number, who were remanded to adult court by the juvenile courts, the statistics do not reveal whether for these minors the fitness [W&I §707] hearings were conducted prior to the jurisdictional [W&I §701] hearings in juvenile court. If such hearings were conducted prior to the adjudicatory stage of these proceedings,[4] jeopardy never attached; and these persons would similarly be unaffected by the Jones v. Breed decision. Therefore, the figures cited by petitioner are not helpful in speculating as to the impact of the decision below.

3/ Petition, p. 10.

4/ Cal. W&I Code §707 does not require the fitness hearing to be held at any particular stage of the juvenile court proceedings.

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In addition, petitioner assumes that the Court's decision will be applied retroactively under Ashe v. Swensen, 397 U.S. 436, 438, n. 1 (1970). The issue of retroactivity was not discussed in the Jones opinion and, at this juncture, must be considered open. Petitioner's fears about the floodgates opening would be better left to a time when the courts have determined whether Jones will be applied retroactively, and when meaningful statistical data is available.

III

THE DECISION BELOW IS COMPATIBLE WITH THE PRACTICES AND PHILOSOPHY OF THE JUVENILE COURT

Petitioner notes that the Ninth Circuit decision is in conflict with various opinions of the California state courts.[5] He suggests elsewhere that the procedure required by the decision in this case is inconsistent with the philosophy of the juvenile court and will be difficult to implement.[6]

As noted previously, the California Supreme Court has explicitly commended the practice of determining the issue of fitness at the very outset of the juvenile court proceedings. Donald L. v. Superior Court, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853 (1972). The court stated that this is the practice which is recommended in the California Juvenile Court Benchbook, a volumn which is used by most, if not all, of the juvenile court judges in California.

Respondent submits that this determination by the California Supreme Court as to the consistency between the result required by the decision below and California juvenile court law is binding upon this Court. It is true that a conflict in constitu-

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5/ Petition, pp. 20-1.

6/ Petition, pp. 12-16.

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tional law does exist. This conflict, however, is of negligible practical significance since it must be assumed that California juvenile court judges will adhere to the procedure recommended by the highest court of the state.

IV

THE PROCEDURE REQUIRED BY THE NINTH CIRCUIT's DECISION IS CLEARLY PREFERRED BY JUVENILE COURT SCHOLARS AND EXPERTS

The practice which is in harmony with the double jeopardy clause is also considered the most desirable by all juvenile court experts.[7/] Petitioner refers to a number of jurisdictions where, apparently, state statutes do not require fitness hearings to be held prior to the commencement of the jurisdictional hearing.[8/] Petitioner does not inform the Court as to what the actual practice is in these jurisdictions. As respondent has already noted, California is one jurisdiction where the practice -- although not required by statute -- is congruent with the requirements imposed by the double jeopardy clause.

There are thriteen jurisdictions which by statute require fitness hearings to be conducted prior to the commencement of the jurisdictional hearing.[9/] Many of these statutes have been

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7/ See, Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 397-98 (1961); Juvenile Court Deskbook, §10.4, supra; National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 9 (1968); U.S. Department of Health, Education and Welfare, Social and Rehabilitative Services, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts, Sec. 27 (1969); American Bar Association National Institute, Uniform Juvenile Court Act, Sec. 34 (final draft, 1969); Note, Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts, 24 Stan L. Rev. 874 (1972).

8/ Petition, p. 9.

9/ Dist. of Col. Code §16-2307(a)(d); Ohio Code Supp. §2151.26 (A); Colorado Rev. Stats §22-3-6(4)(a)(b)(c); Ga. Code Ann. §24A-2501 (1971); Ill. Rev. Stats, ch. 37 §702-713 (Supp. 1972); Minnesota Probate Juvenile Courts, Rules of Procedure, Rule 8-1(2); N.C. Gen. Stats §7A-280; N.H. Rev. Stats Ann. §169.21; N.D. Century Code §27-20-34; N.M. Stat. Ann. §13-14-27 (Supp. 1972); Maryland Code Ann., Art 26 §70-16; Tenn. Code Ann. §37.234(a); Wyoming Stats 1971 Cum. Suppl. §14.115.38.

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enacted as a result of recent redrafting of juvenile court laws. The practice sanctioned by the California Supreme Court, and required by the Ninth Circuit, is clearly consistent with the thinking of modern juvenile court experts and state legislatures.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the Petition for a Writ of Certiorari be denied.

Dated: July 11, 1974

Respectfully submitted,

By Robert L. Walker
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

v.

GARY STEVEN JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

v.

GARY STEVEN JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is applicable to delinquency proceedings in juvenile court.

2. Whether respondent was twice placed in jeopardy in violation of his federal constitutional rights when he was tried and convicted in juvenile court, remanded by

the juvenile court to adult court, and there retried and reconvicted of the same offense for which he had previously been adjudged a delinquent.

STATEMENT OF THE CASE

On February 9, 1971 a petition was filed against respondent in the Superior Court of Los Angeles County, Juvenile Court. The petition alleged that respondent, a seventeen year-old minor, was a person described by section 602 of the California Welfare and Institutions Code[1] in that on or about February 8, 1971 he had committed acts which, if committed by an adult, would constitute the crime of armed robbery in violation of California Penal Code § 211 (App. 15-16). A detention hearing was conducted on February 10, 1971, at the conclusion of which the minor was ordered detained pending trial (App. 8).

The jurisdictional hearing, or trial, was conducted on March 1, 1971. After hearing testimony from two prosecution witnesses and respondent, the court found that the allegations in the petition were true, that the minor was a person described by Welfare and Institutions Code § 602, and sustained the petition. The court also ordered that the minor should remain detained at juvenile hall (App. 18).

At the hearing conducted on March 15, 1971, the court announced its intention, pursuant to Welfare and Institutions Code § 707, to find Jones unamenable to its rehabilitative facilities and to direct the district

[1] Hereafter cited as "W&I Code."

attorney to prosecute the minor under Penal Code § 211. Jones' counsel objected that he had assumed the purpose of the hearing was for determining disposition to the appropriate juvenile facility, and that he had not been notified that the court was considering transfer to adult court. The court continued the matter for one week (App. 20-27).

On March 22, 1971 respondent submitted written points and authorities challenging the contemplated procedure by which he would be retried in adult court for the same offense for which he had been adjudicated a person described by Welfare and Institutions Code § 602. The challenge was posited primarily upon double jeopardy, due process, and statutory grounds (App. 9). The probation officer assigned to respondent's case testified that she believed that Gary was immature and needed psychiatric care, and that his problems would not be met if he were considered unfit and treated as an adult (App. 22, 30). The court overruled Jones' legal objections, and ordered that he be prosecuted as an adult because he had committed three armed robberies (App. 33).

Respondent filed a petition for a writ of habeas corpus in the Juvenile Court of Los Angeles County raising the same double jeopardy claim later adjudicated in federal courts. The writ was heard by the presiding judge of the Los Angeles Juvenile Court who expressed doubt concerning the constitutionality of the challenged procedure:

> "I think you have pointed up enough so it would make one wonder whether the juvenile is not now, in the terms of Gault, again being treated worse than the adult. The fact that it is not

> double jeopardy, according to appellate cases does in a sense mean that the juvenile is being treated worse than an adult. The adult never has to go through these two proceedings." (App. 41).

Nevertheless, the court denied the writ:

> " . . . even though I have considerable doubt as to how fair it is to have the minor go all the way through or even just start a juvenile adjudication and then be able to send him over to adult court, I still would not declare the section unconstitutional. It is, I suppose, a question of quantum in part." (App. 42).

Subsequently, a petition for a writ of habeas corpus raising the same constitutional claim was filed in the California Court of Appeal, Second Appellate District. After initially staying the criminal prosecution, the court denied the petition in an opinion by Justice Kingsley which is reported at 17 Cal. App. 3d 704, 95 Cal. Rptr. 185.[2] A petition for hearing raising the same claims was filed in the Supreme Court of the State of California; on August 4, 1971, the petition was denied, Justice Peters dissenting (App. 46).

On August 23, 1971 a preliminary hearing was conducted before the Municipal Court of Los Angeles County. The hearing was held pursuant to a complaint charging Gary Steven Jones with having committed armed robbery on or about February 8, 1971. Appellant entered a plea of not guilty and a plea of once in jeopardy and once convicted, and submitted this latter plea in writing (App. 47). At the conclusion

[2]The opinion is reprinted as Appendix C to petitioner's Petition for Writ of Certiorari.

of the hearing, respondent was remanded to Superior Court (App. 57).

On September 3, 1971 a felony information was filed against the minor charging him with robbery in violation of Penal Code § 211 (App. 58). Jones pleaded not guilty, and on September 29, 1971 the cause was submitted to the Superior Court of Los Angeles County on the transcript of the preliminary hearing (App. 59-60); respondent was convicted of violating Penal Code § 211 (App. 60). On October 20, 1971 the minor was committed by the Court to the California Youth Authority (App. 62-63).

On December 10, 1971 respondent filed a petition for a writ of habeas corpus before the United States District Court for the Central District of California. In his petition he again contended that he had been twice placed in jeopardy in violation of his federal constitutional rights (App. 7-13). The Attorney General filed a response, oral argument was held, and on May 5, 1972, the Court (Hon. Lawrence T. Lydick) filed a memorandum and order denying the writ.[3]

A timely notice of appeal was filed on June 5, 1972 (App. 115). On June 21, 1972 Judge Lydick denied Jones' application for a certificate of probable cause, but a subsequent application for a certificate of probable cause was granted by the Honorable Richard H. Chambers, Chief Judge of the Ninth Circuit Court of Appeals (App. 116-117).

On May 15, 1974 the Ninth Circuit issued its opinion reversing the judgment of the district court on the

[3]Reported as *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972); reproduced as Appendix B to petitioner's Petition for Writ of Certiorari.

ground that respondent had been twice placed in jeopardy in violation of his rights under the Fifth Amendment. The district court was ordered to issue a writ of habeas corpus directing the state court, within sixty days, to vacate the adult conviction of Jones, either releasing him or remanding him to the juvenile court for disposition.[4]

On June 18, 1974 Judge Wallace of the Ninth Circuit granted petitioner's application for a stay of mandate pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure (App. 126). On October 21, 1974 this Court granted the petition for writ of certiorari and respondent's motion to proceed *in forma pauperis*.

SUMMARY OF ARGUMENT

Gary Jones has been tried for the same armed robbery in both juvenile court and adult court. If Jones were placed in jeopardy at the adjudicatory stage of the delinquency proceeding, his later trial on a felony charge in adult court would constitute double jeopardy. Before this Court can determine whether jeopardy attached during the juvenile court proceedings, however, it is necessary for it to decide whether the double jeopardy clause is applicable at all to delinquency proceedings in juvenile court.

In the trilogy of *Gault-Winship-McKeiver*, this Court placed the burden upon the State to demonstrate why

[4]The opinion of the Ninth Circuit is reported as *Jones v. Breed*, 497 F.2d 1160 (9th Cir. 1974) and is reprinted as Appendix A to the Petition for Writ of Certiorari.

application of fundamental constitutional rights to the juvenile court would not result in a denial of fundamental fairness. In resolving this question, this Court has looked to four principal factors: (1) the underlying basis and rationale of the constitutional right as it applies to the juvenile court; (2) whether application of that right would undermine the distinctive quality of the juvenile court system; (3) recommendations contained in model acts and scholarly articles; and (4) the extent to which the right is already applicable in various jurisdictions. Under these criteria the double jeopardy guarantee is clearly applicable to juvenile delinquency proceedings.

The double jeopardy clause is of ancient origins, and the policies it embodies—protection against the anxiety, embarrassment, and expense of duplicate prosecutions—are as important to minors as they are to adults. Application of the double jeopardy clause to the juvenile court will actually enhance the fairness of such proceedings. Minors confronted by the possibility of duplicate trials for the same offense cannot feel they are being treated fairly, a factor which will undercut the likelihood of their successful rehabilitation.

This Court has frequently emphasized the importance of informality and intimacy to the juvenile court. However, minors who face the uncertainty of transfer for criminal prosecution will be advised by counsel not to admit their culpability to their juvenile probation officer. This will result in large numbers of unnecessary, contested jurisdictional hearings which will further formalize the juvenile court process and drain the court's limited resources.

If minors do talk freely to their probation officers, their admissions may, in many jurisdictions, be introduced against them if they are later transferred to adult court. Even if such admissions are technically inadmissible, the prosecution has discovered the thrust of the minor's defense. The fundamental unfairness of this procedure is evident since the minor is confronted with a choice between either divulging his defense or foregoing the opportunity to contest the transfer to adult court.

If the double jeopardy clause does apply in the transfer setting, it simply means that the fitness decision (whether to waive jurisdiction) must be reached prior to the commencement of the jurisdictional hearing. This will not impair the distinctive quality of the juvenile court system. Unlike the jury trial, the double jeopardy safeguard will have no effect at all upon the *nature* of the juvenile court adjudicatory hearing. Conducting the fitness hearing initially is favored in all of the model codes and statutes which address the issue, and by all except one of the juvenile court scholars and commentators who have written articles on this question. In addition, 19 of the 22 states which specifically require the fitness hearing to be conducted at a particular time adopt the procedure of holding the fitness hearing at the very outset of the juvenile court proceedings. This procedure is also favored by the California Supreme Court.

Once it is determined that the double jeopardy clause does apply to delinquency proceedings, this case is controlled by well-established principles of double jeopardy law. Jones was placed in jeopardy during his trials in juvenile and adult court, both of which resulted

in convictions. This follows from the axiomatic principles that the double jeopardy clause protects against duplicate prosecutions, not simply duplicate punishments, and against double convictions as well as double acquittals. In addition, Jones was in danger of being punished twice for the same offense since California permits criminal prosecution of a juvenile for the same offense for which he has been adjudicated a delinquent, even after he has served part of his commitment in a juvenile correctional institution.

The continuing jeopardy theory espoused by the California cases would sanction retrials where the initial prosecution did not culminate in a final disposition. This theory originated in a dissenting opinion by Justice Holmes which has never gained acceptance by a majority of this Court. It is inconsistent with the prohibition against duplicate and multiple trials and is contrary to numerous decisions by this Court which preclude subsequent prosecution once jeopardy has attached, irrespective of the finality of the initial adjudication. To the extent that the continuing jeopardy theory has any present vitality, it is limited to justifying the well-accepted exception to the double jeopardy rule which permits retrials following reversals on appeal.

ARGUMENT

I.

THIS COURT MUST REACH THE ISSUE OF WHETHER THE DOUBLE JEOPARDY CLAUSE APPLIES TO DELINQUENCY PROCEEDINGS IN JUVENILE COURT.

Gary Steven Jones has been tried twice for the same armed robbery. The first trial occurred in juvenile court and the second trial took place in adult court following the juvenile court's transfer of jurisdiction under Welfare and Institutions Code § 707. In this context the Ninth Circuit held below: " . . . the Fifth Amendment guarantee of double jeopardy is fully applicable to juvenile court proceedings."[5]

Petitioner asserts that since this case involves the determination of Jones' rights after he had been transferred to adult court, the *Gault-Winship-McKeiver* trilogy is not directly germane to the resolution of any issue raised in this case.[6] If this proposition is accepted, petitioner's reliance upon *McKeiver*, and his extensive arguments concerning the effect of the Ninth Circuit's ruling upon the functioning of the juvenile court would be misplaced. The concerns voiced by this Court in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), for the continued vitality of the juvenile court were pertinent to the issue of whether the jury trial requirement should be imposed upon delinquency proceedings in juvenile court. Unless the present case presents a similar

[5] 497 F.2d at 1165.

[6] Petitioner's Opening Brief, pp. 14-21.

issue with regard to the applicability of the double jeopardy clause to delinquency proceedings, it is immaterial whether any incidental burdens would be placed upon the juvenile court as a result of the Ninth Circuit's decision. A basic constitutional guarantee cannot be denied a defendant in a felony trial simply because his prior adjudication occurred in a juvenile court. See *Davis v. Alaska*, 94 S. Ct. 1105 (1974), where this Court held that the state's policy interest in protecting the confidentiality of juvenile court proceedings cannot require a defendant in a criminal case to yield his constitutional right to confrontation and cross-examination.[7]

Respondent believes that the impact of the Ninth Circuit's decision below upon the functioning of the juvenile court should be examined by this Court. But the ramifications of the decision are pertinent only to the issue of whether the double jeopardy clause applies at all to the adjudicatory stage of delinquency proceedings. This issue must be reached because unless Jones was placed in jeopardy in juvenile court, the

[7] If this Court accepts petitioner's characterization of this case as solely involving the constitutional rights of a defendant in a criminal proceeding, it would be a denial of equal protection to deny respondent his double jeopardy protection because of the impact such a decision would have on the juvenile court. An invidious classification would be established between defendants in criminal proceedings who are transferred by the juvenile court and those who are not. See *Baxstrom v. Herold*, 383 U.S. 107 (1966). To create special exceptions to the normal rules of double deopardy would also result in an invidious classification since this Court has consistently warned against a "watered-down" implementation of " the individual guarantees of the Bill of Rights . . ." *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

jeopardy which unquestionably attached during the later criminal proceeding would not be a *double* jeopardy. To determine whether jeopardy attached at the adjudicatory stage of the juvenile court proceeding, it must be determined initially whether the double jeopardy clause of the Fifth Amendment is applicable at all to delinquency proceedings in juvenile court.[8]

Since the applicability of the double jeopardy clause to juvenile delinquency proceedings must be reached in this case, the reasoning of the *Gault-Winship-Mckeiver* trilogy is relevant. For this reason, respondent will

[8] As petitioner's brief correctly notes, the double jeopardy issue may be raised in a variety of contexts involving the juvenile court. These include: (1) a retrial in juvenile court following a prior acquittal in the same court; (2) retrial in juvenile court following a prior conviction in the same court; (3) prosecution in adult court following a conviction in juvenile court; and (4) prosecution in adult court following a conviction in juvenile court and certification or transfer of the minor by the juvenile court. In this brief, respondent shall focus upon the policy reasons underlying the double jeopardy clause which apply specifically to situation four, *supra*, which is presented by the case at bar. However, it should be recognized that many of these policy grounds apply with equal pertinence to any duplicate prosecutions of a minor, irrespective of which courts conduct the trials, or whether the second trial follows a prior acquittal or conviction.

This Court has never sanctioned a divisible theory of double jeopardy; neither has it ever intimated that the *applicability* of the double jeopardy prohibition to a judicial proceeding would turn upon the nature of other judicial proceedings which might ensue. It is immaterial to the constitutional question of the applicability of the double jeopardy clause whether the delinquency proceeding in this case may be followed by a subsequent delinquency proceeding in juvenile court or by an adult criminal prosecution.

examine the practical impact upon the juvenile court process of applying and enforcing the double jeopardy prohibition. As will be demonstrated, implementation of this guarantee will not undermine the juvenile court's ability to function in a unique manner [see *McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971)] but, rather, will enhance the "fundamental fairness" of the juvenile court process.

II.

THE DOUBLE JEOPARDY GUARANTEE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS APPLICABLE TO DELINQUENCY PROCEEDINGS IN JUVENILE COURT.

In the trilogy of *In re Gault*, 387 U.S. 1 (1967), *In re Winship*, 397 U.S. 358 (1970), and *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court achieved a considerable constitutional domestication of the juvenile court while defining the structure within which to determine if other constitutional safeguards should be applied to the juvenile court process. The applicability of the double jeopardy prohibition was not explicitly discussed by the Court. However, since this Court has overruled *Palko v. Connecticut*, 302 U.S. 319 (1937), in *Benton v. Maryland*, 395 U.S. 784 (1969), and held that the double jeopardy clause of the Fifth Amendment is germane to state criminal proceedings, applicability of the double jeopardy protection to state juvenile court proceedings is ripe for decision. The aforementioned trilogy provide the framework for resolution of this issue.

In *In re Gault*, 387 U.S. 1 (1967), this Court held that a minor in a juvenile delinquency proceeding is protected by various provisions in the Bill of Rights. These include specifically: adequate notice of the charges against him, representation by counsel (including the right to court-appointed counsel if he is indigent), the right not to incriminate himself, and the right to confront and cross-examine adverse witnesses. Although the double jeopardy issue was not raised in *Gault, supra*, this Court did, in a footnote, intimate that retrial of a juvenile in adult court for the same offense for which the minor had been adjudicated a delinquent, and had served time under a juvenile court commitment, might constitute a denial of procedural due process.[9]

In *In re Winship*, 397 U.S. 358 (1970), this Court held that minors who are the subjects of delinquency proceedings are entitled to be tried in accordance with the criminal law standard of proof beyond a reasonable doubt. And in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court held that juveniles are not constitutionally entitled to trials by jury in delinquency proceedings.

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[9] "The impact of denying fundamental procedural due process to juveniles involved in 'delinquency' charges is dramatized by the following considerations. . . .(4) In some jurisdictions a juvenile may be subjected to criminal prosecution for the same offense for which he has served under a juvenile commitment. However, the Texas procedure to this effect has recently been held unconstitutional by a federal district court judge, in a habeas corpus action. *Sawyer v. Hauck*, 245 F. Supp. 55 (D.C.W.D. Tex. 1965)." *In re Gault*, 387 U.S. 1, 20-21 n.20 (1967).

Although the result in *McKeiver, supra*, differed from *Gault* and *Winship*, this turned upon distinctions in the constitutional rights under consideration, and their impact upon the juvenile court system, not upon underlying assumptions or modes of analysis. Indeed, the analytical underpinnings of *Gault* and *Winship* were left untouched by the pragmatic approach reflected in *McKeiver*.

First, this Court has uniformly agreed that constitutional rights shall not be denied minors in delinquency proceedings because traditionally these proceedings were considered civil rather than criminal. In *In re Gault*, 387 U.S. 1, 50 (1967), this Court termed the "civil" categorization a "feeble. . .label of convenience"; and in *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971), this Court rejected the civil-criminal dichotomy as "wooden." Likewise, this Court has refused to withhold constitutional safeguards from juveniles because the State is acting *parens patriae*. As the Court exhorted in *In re Winship*, 397 U.S. 358, 365-66 (1969):

> " . . . civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." See also *In re Gault, supra*, at 18, 19.

Common to this Court's decisions has been the recognition that juvenile delinquency proceedings potentially result in severe deprivations of the minor's liberty[10] and are "comparable in seriousness to a felony

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[10] This is as true in California as it is in other states. Authorized dispositions in California include probation, foster care, placement in a juvenile home, ranch, camp of forestry camp, or commitment to the California Youth Authority. W&I

prosecution." See *In re Gault*, 387 U.S. 1, 27-28,33 (1967). Constitutional safeguards have also been appied to the juvenile court because of the stigma associaed with a juvenile court adjudication which, despite attempts at minimization, infects juvenile delinqueicy adjudications to almost as great an extent as criminal convictions. See *In re Winship*, 397 U.S. 358, 363 (1970); *In re Gault*, 387 U.S. 1, 23-25 and n.31 (1967); *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 776 n.10, 94 Cal. Rptr. 813, 818 n.10 (1971).

Finally, this Court has consistently recognized that the juvenile court system has failed to live up to its idealistic goals of tender care and successful rehabilitation. Although not wishing to give impetus to the system's demise [*McKeiver v. Pennsylvania*, 403 US. 528, 551 (1971)], this Court has frequently voiced concern, shared by numerous scholars and juvenile court practitioners, that,

> "... the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative

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Code §§ 725-731. Although the juvenile court may only assune jurisdiction over a minor who was under the age of eighteen when he committed the offense (W&I Code § 602), the court may retain jurisdiction over the minor until he attains age twenty-one. W&I Code § 607. Hence, every delinquent ward of the court in California potentially is within the juvenile court's jurisdiction for at least three years.

> treatment postulated for children." *Kent v. United States*, 383 U.S. 541, 556 (1966)[11]

For these reasons, this Court has effectuated a constitutional domestication of the juvenile court. Nevertheless, this Court has rigorously opposed wholesale application of all Bill of Rights safeguards as urged by Justice Black in *In re Gault*, 387 U.S. 1 at 61. Instead, the Court has adopted an analysis which determines whether failure to apply a constitutional safeguard would result in a denial of "due process and fair treatment" [*In re Gault*, 387 U.S. 1 at 30 (1967)] or, as the Court stated in *McKeiver v. Pennsylvania*, 403

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[11]The concerns articulated by this Court have found expression with increasing frequency in judicial opinions finding conditions in juvenile correctional institutions cruel and unusual, barbaric, and inhumane. See, *e.g.*, *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), [finding several institutions operated by the Texas Youth Council to be the scene of widespread psychological and physical brutality degrading to human dignity and violative of the Eighth Amendment's cruel and unusual punishment clause]; *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) [conditions in juvenile institutions insidiously destructive of minors' humanity and violative of Eighth Amendment]; *Martarella v. Kelly*, 349 F. Supp. 575 (S.D.N.Y. 1972) [squalid, outdated, decayed and dilapidated institution for female PINS wards of juvenile court ordered closed because conditions considered cruel and unusual]; *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. den.*, ____ U.S. ____ (1974) [Eighth Amendment violations found in Ohio juvenile institution where there were frequent "fraternity paddle beatings" and where potent tranquillizing drugs were administered without medical authorization]; *Lollis v. New York State Dept. of Social Services*, 322 F. Supp. 473 (S.D.N.Y 1970), *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971) [confinement of 14 year old girl in strip cell for two weeks without educational matter or recreational facilities constitutes cruel and unusual punishment].

U.S. 528 at 543 (1971), a denial of "fundamental fairness."

This approach necessarily involves a balancing of considerations. But for present purposes, it is important to note that the aforementioned factors—the potential for severe deprivation of liberty, the quasi-criminal aspects of a delinquency adjudication, the stigma associated with a finding of delinquency, and the now well-documented possibility that the minor may not only fail to receive solicitous care but may, in fact, be punished in a "cruel and unusual" manner—coalesce to place the burden upon the State to demonstrate why refusal to apply a fundamental constitutional right would not result in a denial of fundamental fairness. See Note, *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 160 (1969); *In re Winship, supra*. In *In re Gault*, 387 U.S. 1 (1967), this Court emphasized that the fairness required in delinquency proceedings includes " . . . the appearance as well as the actuality of fairness . . . " because the essentials of due process may be more important in improving the juvenile's attitude towards rehabilitation than the goodwill and compassion of the court. *Id*. at 26. Both the trappings and essence of fairness must be present.

In determining whether these standards have been satisfied, this Court has in *Gault, Winship* and *McKeiver, supra*, looked to four principal factors: (1) the underlying basis and rationale of the constitutional right as it relates to the juvenile court; (2) whether application of that right would undermine the distinctive quality of the juvenile court system; (3) recommendations contained in model acts and scholarly articles dealing with the juvenile court; and (4) the

extent to which the right is already applicable in various states by statute or court decision. See Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 Wm. and Mary L. Rev. 266, 275 (1972). Applying these criteria to the present case, it will be demonstrated that application of the double jeopardy safeguard will promote the "fundamental fairness" to which juveniles are entitled as a matter of constitutional right.

A. The Double Jeopardy Prohibition Will Enhance the "Fundamental Fairness" of the Juvenile Court System as Well as the Court's Ability to Act in a Unique Manner.

It requires little citation to establish the fundamental importance of the prohibition against twice placing a person in jeopardy, or its ancient origins. The roots of the double jeopardy clause can be traced to Greek and Roman times, and the principle became established in the common law of England long before this Nation's independence. *Benton v. Maryland*. 395 U.S. 784, 795 (1969). Justice Black has noted that fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas in western civilization. *Bartkus v. Illinois*, 359 U.S. 121, 152 n.3 (1959) (dissenting). Citing numerous historical sources, Justice Black concluded, "Few principles have been more deeply 'rooted in the traditions and conscience of our people.'" *Id*. at 155. The extraordinary acceptance of this principle is demonstrated by the fact that today every State incorporates some form of the prohibition in its constitution or common law.

Sigler, *Double Jeopardy* 34 (1969). Unlike the right to a jury trial, the double jeopardy clause has been held applicable to all criminal proceedings and is fully retroactive. See *Price v. Georgia*, 398 U.S. 323, 330 n.9 (1970); *Ashe v. Swensen*, 397 U.S. 436, 437 n.1: *Waller v. Florida*, 397 U.S. 387, 391 n.2 (1970).

The language of the double jeopardy clause applies to all persons without exception; it draws no distinction between adults and minors:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " U.S. Const., Amend V

In view of the importance attached to this monumental bulwark of our liberty, it would indeed be surprising if the protection it affords were available to hardened criminals but not to children. See *In re Gault*, 387 U.S. 1, 47 (1967).

Perhaps the best statement of at least some of the policies promoted by the double jeopardy prohibition is contained in *Green v. United States*, 355 U.S. 184 (1957):

> "The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . " *Id.* at 187-88.

These policies apply with particular forcefulness to juveniles who are neither as sophisticated nor as able to resist the pressures exerted by the State as their more

mature and experienced adult counterparts. See *Haley v. Ohio*, 332 U.S. 596 (1948), and *Gallegos v. Colorado*, 370 U.S. 49 (1962), where this Court noted that particular care must be taken in determining the voluntariness of a juvenile's confession.

Under the procedure followed in the present case, Jones was unaware at the time of arrest that he would face a criminal prosecution. Indeed, the underlying assumption of both Jones and his counsel was that he would be tried as a juvenile and, if convicted, treated as a ward of the juvenile court.[12] In *Gault, supra*, this Court emphasized the need for the juvenile court to provide "the appearance as well as the actuality of fairness, impartiality and orderliness." 387 U.S. at 26. But the patent unfairness of reprosecuting a juvenile for the same offense for which he has previously been tried can rarely, if ever, be conducive to effective rehabilitation. See Carr, *The Effect of the Double Jeopardy Clause on Juvenile Court Proceedings*, 6 U.Tol.L.Rev. 1, 7 (1974); cf. *United States v. Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955). The appearance and actuality of fairness may, as this Court has recognized, be far more important to the juvenile's ultimate rehabilitation than the court's own good intentions. *In re Gault*, 387 U.S. 1, 26, citing Wheeler and Cottrell, *Juvenile Delinquency—Its Prevention and Control* 33 (Russell Sage Foundation 1966); Report of the President's Commission on

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[12] Even at the fitness hearing Jones' attorney was still under the impression that Jones was to be treated as a ward of the juvenile court. When the court announced its intention to transfer jurisdiction to adult court, counsel expressed surprise and requested a continuance, which was granted (App. 20-27).

Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 85 (1967). Recent articles and studies conclusively attest to the singular importance in any rehabilitation program of the minor's subjective feelings that he has been treated fairly.[13] A minor confronted by the possibility of undergoing duplicate prosecutions which adult defendants, charged with the most serious offenses, will never have to face cannot feel that he is being treated even-handedly.

One of the hallmarks of the juvenile court system is its intimacy and informality [see *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971); *In re Gault*, 387 U.S. 1, 25 (1967)]. The juvenile court encourages minors to admit their transgressions and, hence, to avoid the necessity for a formal, adversary trial. If, however, the procedure utilized by the State in this case is sanctioned, the ability of the juvenile court to function in this unique manner will be severely impeded. See *Bryan v. Superior Court*, 7 Cal.3d 575, 586-589, 102 Cal. Rptr. 831 (1972), *cert. den.*, 410 U.S. 944 (1973); cf. *In re Paul T.*, 15 C.A. 3d 886, 93 Cal. Rptr. 510 (1971).

Any attorney worth his salt will advise his client not to cooperate with his juvenile probation officer because he will not know whether the minor may be later prosecuted as an adult. Indeed, this is the position

[13]See, *e.g.*, MacFaden, *Changing Concepts of Juvenile Justice*, 17 Crime and Delinquency 131 at 141 (1971); Lipsitt, *The Juvenile Offender's Perceptions*, 14 Crime and Delinquency 49 (1968); Wheeler, *Controlling Delinquents* at 153 and 187 (John Wiley and Sons 1968); Foster and Freed, *A Bill of Rights for Children*, VI Family Law Quarterly 343 at 353-354 (1972); Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 Crime and Delinquency 180 (1971).

taken in the volume on juvenile court practice published by the educational arm of the California State Bar Association to advise lawyers how to handle cases in juvenile court.

> "As long as transfer is a serious possibility, the case must be handled on the assumption that it will be transferred, and the attorney should share information and permit his client to talk with the probation officer only to the same extent and in the same manner he would with the district attorney if the case had already been transferred." R. Boches and J. Goldfarb, *California Juvenile Court Practice* 17 at 124-125 (C.E.B. 1968).

Most juveniles confronted by serious charges will refuse to discuss their complicity with their juvenile probation officer because of uncertainty as to whether their cases will be transferred to adult court. Plea bargains will also be rendered difficult because if the minor is transferred, sentencing will occur in a forum outside of the jurisdiction or control of the juvenile probation officer and the juvenile court.

Unless the fitness hearing is conducted prior to the jurisdictional hearing, the minor will necessarily suffer the anxiety and insecurity from which the double jeopardy clause is intended to shield him. See *Green v. United States*, 355 U.S. 184, 187-188 (1957). In most cases he will refuse to admit his guilt, thereby forcing the court to waste valuable judicial resources on a thoroughly unnecessary trial. He will suffer the expense of a second trial which may drain the resources of his family, thus causing the minor additional embarrassment and even anguish.[14] If the juvenile court does

[14]Most juveniles do not have independent resources sufficient to remunerate counsel.

decide to transfer the minor to adult court, he will spend weeks or months in a juvenile hall or jail in which he will usually receive no rehabilitation.[15] In California the minor has no right to bail while awaiting his jurisdictional hearing.[16] By the time the jurisdictional hearing and the fitness hearing have been conducted, and the minor manages to have himself released from jail on bail, important witnesses and other evidence may have disappeared, thereby undermining his ability adequately to defend himself.

Perhaps even more significantly, conducting the jurisdictional hearing prior to the fitness determination presents the minor with an awesome Hobson's Choice he is ill equipped to handle. As one commentator has described his dilemma:

> "The minor is faced with a critical situation in which he must sacrifice one right—either his right to remain silent and not disclose defenses prior to trial or his right to present his case—in order to exercise another." Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Court*, 24 Stanford L. Rev. 874, 902 n.137 (1972).

If the minor remains silent at the adjudicatory hearing in juvenile court, he runs the risk of being convicted

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[15]See *Children in Custody, A Report on the Juvenile Detention and Correctional Facility Census of 1971*, U.S. Dept. of Justice, Law Enforcement Assistance Administration 13-16; Rosenheim, *Detention Facilities and Temporary Shelters in Child Caring*, 259-265 (Pappenport, Kilpatrick, & Roberts eds., 1973).

[16]*In re William M.*, 3 Cal.3d 16, 26 n.17, 89 Cal. Rptr. 33 (1970); W&I Code §§632, 635, 636. In any case in which the minor is charged with a serious offense, which would be a felony if he were an adult, he can be detained on the grounds that "...it is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another ..." W&I Code §636.

even though innocent. There is also a very strong possibility that the probation department will consider the minor uncooperative and for that reason give him an unfavorable recommendation.[17]

If, on the other hand, the minor does testify at the jurisdictional hearing, he exposes himself to the possibility that his testimony may be used against him if he must later undergo a criminal proceeding.[18] Even where the minor's testimony is not admissible, the state has discovered the thrust of his defense. By enabling the prosecution to have a "trial-run," the likelihood of conviction has been enhanced. There will be no proportionate increment in the defendant's ability to resist the prosecutor's cases. Note, *Double Jeopardy*, 75 Yale L. J. 262, 280 n.125 (1965); *The Problems of Long*

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[17]The Presiding Judge of the Los Angeles Juvenile Court recognized the minor's quandary in the present case: "If he [the minor] doesn't open up there is of course the danger that the probation officer will find that he is so uncooperative that he cannot make a recommendation for the kind of treatment you [counsel] think he really should have ..." (App. 38).

[18]29 states exclude use of evidence admitted in a juvenile court hearing in any other court. See, Carr, *The Effect of the Double Jeopardy Clause on Juvenile Court Proceedings*, 6 Tol. L. Rev. 1, 53 n.299. In addition, California excludes at the adult trial evidence of the minor's admissions to the juvenile court judge or probation officer. *Bryan v. Superior Court*, 7 Cal.3d 575, 587, 498 P.2d 1079, 1087 (1972). However, these provisions do not resolve the minor's dilemma because they may merely protect him against use of the previously admitted evidence to show the existence of a prior adjudication of delinquency. Carr, *supra*, at 53.

Criminal Trials, 34 F.R.D. 155, 161 (1964).[19] As the Ninth Circuit stated below:

> "The most heinous and despicable criminal is saved from such an invasion of his fundamental rights. Yet, if we adopt California's position, we approve having such a procedure applied to those of tender years. This offends our concepts of basic, even-handed fairness." 497 F.2d at 1168.

Many state courts do allow juvenile confessions to be admitted in adult court. Florida permits a juvenile confession to be admitted in adult court as long as it is not shown to be involuntary. *State v. Francois*, 117 So. 2d 492 (Fla. 1967), while Illinois authorizes introduction in adult court of confessions made by juveniles to the police or state's attorneys upon the theory that they are not officers of the juvenile court. *People v. Hester*, 39 Ill. 2d 489, 237 N.W. 2d 466 (1968). Other states permit introduction of juvenile confessions in adult proceedings as long as the juvenile is warned of the possibility of adult prosecution and intelligently and voluntarily waives his right to remain silent. *State v. Lloyd*, 212 N.W. 2d 671 (Minn. 1973); *Mitchell v. State*, 464 S.W.2d 307 (Tenn. Cr. App. 1971); *State v. Gullings*, 416 P.2d 311 (Ore. 1966).

But even in the jurisdictions which follow relatively progressive rules of admissibility, the minor's dilemma

[19]Once again, the Presiding Judge of the Los Angeles Juvenile Court commented below about the unfairness of this procedure: "I must say that [making the juvenile's testimony at a jurisdictional hearing inadmissible in a criminal trial] doesn't impress me because if the minor admitted something in Juvenile Court and named his companions, nobody is going to eradicate from the minds of the district attorney or other people the information they obtained." (App. 41-42).

remains unabated. It is little solace to the child that he is informed that he *may* be transferred to criminal court at some later time. The mere possibility of transfer will frequently frighten him into a silence which will be construed to his detriment. Less frequently, he might admit his culpability only to find that the prior admonition he received indelibly identifies his admissions as "voluntary" and "intelligent."

Even the most hardened criminal is not exposed to this dilemma. He is under no compulsion to testify before the grand jury or at his preliminary hearing. He feels little pressure to reveal the thrust of his defense or the manner in which he will cross-examine the prosecution's witnesses. But a juvenile in Jones' position who chooses to exercise his right to remain silent may well be sacrificing his right to the relatively more tender care and regenerative treatment available through the juvenile court. By extracting a waiver of a fundamental right as a price for asserting another right, the State is placing the minor in an untenable position which cannot be equated with basic principles of fundamental fairness. See, *e.g.*, *Blackledge v. Perry*, 94 S. Ct. 2098 (1974); *Benton v. Maryland*, 395 U.S. 784, 811-812 (1969); *United States v. Jackson*, 390 U.S. 570 (1968); *Green v. United States*, 355 U.S. 184, 192 (1957).

Finally, it is important to recognize that California utilizes Welfare and Institutions Code § 707 to certify minors to adult court even after they have been committed to juvenile institutions and have begun to serve their terms of confinement. *Bryan v. Superior Court*, 7 Cal. 3d 575, 498 P.2d 1079 (1972), *cert. den.*, 410 U.S. 944 (1973); see Welfare and Institutions Code

§§ 707, 780 and 1737.1. Although this precise procedure was not utilized in the present case, all minors in California who otherwise qualify for certification confront this possibility of transfer to adult court even after they have commenced their treatment programs. This procedure violates the double punishment part of the double jeopardy prohibition [*North Carolina v. Pearce*, 395 U.S. 711 (1969)] and permits juvenile institutional authorities to unilaterally usurp the juvenile court's dispositional authority. This occurs because if the Youth Authority returns a minor to the juvenile court pursuant to Welfare and Institutions Code §§ 780 and 1737.1, "the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance. . . ." W&I Code § 707. Under § 707, and as a practical matter, the juvenile court is bound by the institution's decision to return the minor for certification.[20] And the Youth Authority's decision has been reached without any statutorily created safeguards. W&I Code §§ 780, 1737.1.

Under *McKeiver v. Pennsylvania, supra*, the State is required to demonstrate why the application of a fundamental constitutional safeguard would impair the juvenile court's ability to function in its specialized manner. Although not required to do so by the *McKeiver* decision, respondent has demonstrated that applying the double jeopardy clause in the present

[20]W&I Code § 1737.1 also provides that if the minor is returned to juvenile court by the Youth Authority, ". . .said court may not recommit such person to the Youth Authority."

context will enhance the juvenile court's ability to act in its unique fashion and preserve the "fundamental fairness" of juvenile court processes.

B. Applying the Double Jeopardy Clause to the Juvenile Court Will Not Impair the Court's Ability to Function in a Unique Manner.

In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court declined to impose a mandatory jury trial upon the juvenile court because it believed that imposition of the jury trial requirement would destroy the distinctive quality of the juvenile court system.

> "If the jury trial were to be injected into the juvenile court system, it would bring with it into that system the traditional delay, the formality and the clamor of the public adversary system and, possibly, the public trial." 403 U.S. at 541.

Unlike the jury trial requirement, application of the double jeopardy safeguard in the context of the present case would not sound the death knell to the juvenile court process. In fact, unlike the jury trial guarantee, it would not affect at all the *nature* of the proceeding by which the juvenile court determines whether the minor has committed an offense which brings him within the court's jurisdiction. Application of this constitutional safeguard would simply mean that once jeopardy attaches at a jurisdictional (W&I Code § 701) hearing, the minor may not be retried in either juvenile or adult

court absent a recognized exception to the double jeopardy prohibition.[21]

The only right being asserted by the State in this case is the right to conduct a fitness hearing (W&I Code § 707) after the juvenile court has concluded the jurisdictional hearing (W&I Code § 701).[22] The State's interest in this procedure is obviously far more limited than the interests at stake in *McKeiver, supra*, which this Court believed went to the very essence of the juvenile court process. 403 U.S. at 550-551. Indeed, it can be fairly asserted that the State's interest in ensuring that jurisdictional hearings be conducted prior to fitness determinations is negligible since the California Supreme Court has expressed its clear preference for the procedure which the Ninth Circuit found to be constitutionally mandated in the case at bar:

> "The usual practice as to a fitness hearing in many juvenile courts in this state is that followed in the case before us. A hearing on the issue is noticed and held before the jurisdictional hearing. This practice of deciding the issue of fitness at the very outset is recommended in the California Juvenile Court Benchbook (Cal. College of Trial Judges (1971) § 10.4, pp. 190-191) and we commend it." *Donald L. v. Superior Court*, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853 (1972).

[21] Applying the double jeopardy clause would also mean, more broadly, that once jeopardy attached at a jurisdictional hearing in a delinquency case, future adjudications of the minor in juvenile court for the same offense would be precluded. This position has been accepted by the California Supreme Court, at least where the jurisdictional hearing resulted in an acquittal. *Richard M. v. Superior Court*, 4 Cal.3d 370, 93 Cal. Rptr. 752 (1971).

[22] This result is authorized, although not required, by state statute. W&I Code § 707. The California Supreme Court has interpreted Welfare and Institutions Code § 707 to permit the fitness hearing to be held either before or following the jurisdictional hearing. *Bryan v. Superior Court*, 7 Cal.3d 575, 102 Cal. Rptr. 831 (1972); *Donald L. v. Superior Court*, 7 Cal.3d 592, 102 Cal. Rptr. 850 (1972).

The State of California is, ironically, asking this Court to rule that the double jeopardy clause is inapplicable to juvenile court proceedings so that it may perpetuate a practice which is not favored by the highest court in California. Presumably, the considerations advanced in petitioner's brief in favor of conducting the jurisdictional hearing prior to the fitness hearing were rejected by the California Supreme Court in *Donald L. v. Superior Court, supra*. The State's argument in this case turns *McKeiver* on its head. We shall now turn to the individual considerations raised by petitioner and discuss them *seriatim*.

1. In California a Fitness Hearing is Not a Dispositional Alternative.

The State argues that California should be permitted to retain the fitness hearing as a dispositional alternative. However, the California Juvenile Court Law does not enumerate transfer to adult court as a permissible dispositional alternative. The dispositional powers of the juvenile court are set forth in W&I Code §§ 725-741. Permissible dispositions in a delinquency case include probation (W&I Code § 725), foster care (W&I Code § 727), commitment to a juvenile home,

ranch, camp, or forestry camp (W&I Code § 730), or commitment to the California Youth Authority (W&I Code § 731). Transfer to adult court is not listed as a dispositional alternative.

Only three jurisdictions require that a finding of delinquency be made before transfer of the minor to adult court.[23] The great majority of jurisdictions either require or permit the fitness hearing to be conducted prior to the adjudicatory hearing.[24] Only the three aforementioned states will be forced to amend their statutes if Jones' position is sustained.

2. Fitness Hearings Concern a Minor's Amenability to the Treatment Facilities Available to the Juvenile Court–Not His Guilt or Innocence.

Petitioner equates fitness hearings with preliminary hearings in adult court and argues that as a result of the Ninth Circuit's decision, state courts will have to conduct two trials directed towards determining the minor's guilt. This argument reflects an inaccurate understanding of the nature and function of the fitness hearing both in California and other jurisdictions.

The sole criteria in California for determining whether a minor should be transferred for criminal prosecution are: (1) the minor must be at least sixteen years of age at the time of the alleged commission of the offense, (2) he must be charged with a violation of a criminal statute or ordinance, and (3) he must

[23]Mass. Ann. Laws, Chap. 119 § 61 (1969); West Vir. Code Ann. 49-5-14 (1974); Alabama Code, Title 13 § 364 (1958).

[24]Notes 45-47, *infra*.

"... not be amenable to the care, treatment and training program available through the facilities of the juvenile court ..." (W&I Code § 707).[25] California, like all jurisdictions except three,[26] does not require a finding as to the minor's guilt or delinquency before transfer is authorized.[27] In fact, the California Legislature has explicitly provided that, "... the offense, in itself, shall not be sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law." W&I Code § 707. Certifications to adult court based solely upon the seriousness of the offense have been reversed by California appellate courts. See *Bruce M. v. Superior Court*, 270 C.A. 2d 566, 75 Cal. Rptr. 881 (1969).

The factors upon which an unsuitability finding is based are generally those which "... indicate a poor prognosis for rehabilitation...." *People v. Smith*, 5

[25]Most state fitness statutes contain similar standards. Some require a specific finding as to the minor's amenability to the juvenile court's treatment facilities. See Alabama Code, Title 13 § 364 (1958); Kansas Stat. Ann. 38-808(b) (1973); Ohio Rev. Code Ann. § 2151.26(A) (2) (Supp. 1973). A large number of state statutes contain provisions requiring the juvenile court to find that it would be in the best interests of either the child or the state, or both, in order for the minor to be transferred for criminal prosecution. See Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 Wm. and Mary L. Rev. 266, 298-299 and n.131 (1972).

[26]Cited in note 44, *infra*.

[27]A minority of eleven jurisdictions do require a finding as to probable cause to believe the child committed the offense before transfer of jurisdiction is sanctioned. Rudstein, *supra*, at 299 n.132.

Cal. 3d 313, 317, 96 Cal. Rptr. 13 (1971). The California Supreme Court has held that the only factor that a juvenile court "*must*" [emphasis in original] consider at the fitness hearing is the minor's behavior pattern as described in the probation officer's report. *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 714, 91 Cal. Rptr. 600 (1970). The court *may* also consider other factors, including the nature of the offense allegedly committed and the circumstances and details surrounding its commission; but these factors are relevant only to the pervasive issue of the minor's "amenability to treatment as a juvenile. . . ." *Id.* at 715-716.

Thus, requiring the fitness hearing to be conducted prior to the jurisdictional hearing will not result in duplicate trials directed towards determining the minor's guilt. In fact, where the minor has already been detained by the juvenile court, as would be true in most cases where certification is under consideration, a determination must, under state law, already have been reached at the detention hearing that there is probable cause to believe the minor has committed the offense alleged in the petition. *In re William M.*, 3 Cal. 3d 16, 28, 89 Cal. Rptr. 33 (1970). In all cases the child's guilt or innocence would be beyond the scope of the fitness hearing. Instead, the hearing will focus upon the minor's record, his performance in other rehabilitative programs, the availability and suitability of juvenile treatment resources, and the gravity of the offense insofar as it may indicate incorrigibility. See *Jimmy H. v. Superior Court, supra; Note, Rights and Rehabilitation in the Juvenile Courts*, 67 Col. L. Rev. 281, 315 (1967).

As any seasoned trial judge knows, a full-blown trial takes far more time than a hearing which is concerned with sentencing or disposition. Since the unfitness determination may be based upon hearsay [*Jimmy H. v. Superior Court, supra*], the prosecution's side of the fitness hearing will customarily consist of a previously prepared social study [W&I Code § 706]. The minor will then have the opportunity to cross-examine the probation officer and to present affirmative evidence relating to his amenability to the court's treatment resources. Regardless of when the fitness hearing is conducted, the minor will have a full opportunity to demonstrate why he should be retained within the juvenile court system. The relative brevity of the fitness hearing, compared to a trial, or the differences in functions between the two types of proceedings, cannot—as petitioner asserts[28] – be equated with any lack of fundamental fairness.

3. Cases Retained by the Juvenile Court Probably Will Have to be Reassigned to a Different Judge or Referee.

Respondent agrees with petitioner that in most cases where the juvenile court decides to retain jurisdiction over the minor, the jurisdictional hearing will have to be conducted by a different judge or referee than the one who presided at the fitness hearing. This is to ensure that the judge or referee will not be unduly influenced by legally irrelevant or incompetent in-

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[28]Petitioner's Opening Brief, pp. 44-45.

formation in resolving the jurisdictional issue. *In re Gladys R.*, 1 Cal. 3d 855, 83 Cal. Rptr. 671 (1970).[29]

The necessity for reassigning the case to a new judge or referee was specifically considered in *Donald L. v. Superior Court*, 7 Cal. 3d 592, 102 Cal. Rptr. 850 (1972), a case decided prior to *In re Michael V., supra*. The California Supreme Court there held that where jurisdiction is retained, the case should be heard by a different judge or referee. *Id.* at 853. Despite some administrative inconvenience, the Court noted that conducting the fitness hearing first is the preferred practice. *Ibid.* We suggest that the impact of this procedure upon the administration of the juvenile court is uniquely within the competence of the state courts, and that great deference should be given a determination in this regard by California's highest tribunal.

It is true that it would be more efficient for a single judge to handle these cases. Some administrative inconvenience will be experienced, especially in those rural counties which only have one superior court

[29]In California this conclusion is open to question under the recent decision of the California Supreme Court in *In re Michael V.*, 10 Cal.3d 676, 111 Cal. Rptr. 681 (1974). In that case, the Court held that the judge's reliance upon the probation report at the jurisdictional hearing is not error if the probation officer who prepared the report is available for cross-examination. *Id.* at 683. Presumably, cases retained by the juvenile court after a fitness determination may not have to be assigned to a different judge if the probation officer is available for cross-examination.

Respondent believes that the better view is reflected by *Gladys R., supra*, because the right to cross-examine the probation officer will not adequately protect the minor against the court's reliance upon hearsay or prejudicial or incompetent evidence.

judge.[30] As this Court has repeatedly emphasized, however, constitutional rights are not to be sacrificed upon the altar of speed, convenience, or efficiency.

> "Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 654, 656 (1972).

4. The Thoroughness of the Fitness Hearing is not Determined by Its Timing.

Petitioner suggests that one result of conducting the fitness hearing prior to the jurisdictional hearing will be the absence of an adequate "investigation."[31] If petitioner is referring to an investigation into the minor's guilt, this consideration is, as previously noted, irrelevant in all except three jurisdictions. If petitioner is, rather, focusing upon the minor's amenability to facilities and programs available to the juvenile court,

[30]The juvenile court in California is a branch of the superior court. W&I Code § 550. It is a simple matter, therefore, for any superior court judge to sit in juvenile court, and juvenile court matters are frequently heard by superior court judges – particularly where there is only one juvenile court judge and he has been disqualified, is ill, or is otherwise unavailable.

[31]Petitioner's Opening Brief, p.44.

there is no reason why a thorough investigation of these matters cannot be made prior to the fitness determination. As one state court has recognized,

> "[I]f a county attorney is causing juvenile cases to be investigated properly. . . . he will know in advance whether he desires to prosecute criminally and he can so move the court at or before the outset of the [jurisdictional] hearing. He has available the investigative facilities of the probation officer, the law enforcement officers, and the social services staff." *State v. Halverson*, 192 N.W. 2d 765, 769 (S. Ct. Iowa 1971).

Pursuant to *Donald L. v. Superior Court*, 7 Cal. 3d 592, 102 Cal. Rptr. 850 (1972), the vast majority of fitness hearings in California are conducted prior to the jurisdictional hearing. 19 of the 22 states which specify by legislation or judicial decision when the fitness hearing must be held require that the fitness hearing be conducted prior to the jurisdictional hearing.[32] If a state wishes to incorporate a probable cause requirement into its transfer procedure, it is, of course, free to do so; but most states, like California, have declined to impose such a rule.[33] The collective experience of most American jurisdictions refutes petitioner's contention that the practice favored by the California Supreme Court in *Donald L. v. Superior Court, supra*, results in any unfairness to the juvenile.

Petitioner notes that there were 14,094 delinquency petitions filed in Los Angeles County in 1972 which were processed by five juvenile court judges and

[32]Notes 45 and 46, *infra*.

[33]Note 48, *infra*.

twenty-four commissioners sitting as referees.[34] It should be recognized, however, that in very few of these cases was transfer to adult court even a possibility. The criteria for transfer under Welfare and Institutions Code § 707 are stringent,[35] and transfer will not be considered unless the standards enumerated therein have been satisfied. These include a determination that the minor is unamenable to the entire range of rehabilitative programs and facilities available to the juvenile court (W&I Code § 707). For these reasons, only 509 out of 49,788 delinquency cases in California, or 2.1%, were remanded to adult court in 1972,[36] the last year for which statistics are available.

No increase in judicial manpower will be required if fitness hearings are conducted prior to jurisdictional hearings in all cases. As previously discussed, more minors will admit their guilt, thereby obviating the necessity for jurisdictional hearings. Where cases are transferred to adult court, a thoroughly unnecessary jurisdictional hearing in juvenile court will have been avoided. Even where jurisdiction is retained, the dispositional hearing will be primarily concerned with the same evidence which will have been introduced previously at the fitness hearing. Hence, it is to be anticipated that in these cases only an abbreviated dispositional hearing will be necessary.

[34]Petitioner's Opening Brief, p. 41.

[35]See discussion at pp. 32-34, *supra*.

[36]*Crime and Delinquency in California*, Table 13 at 52 (Bureau of Criminal Statistics 1972).

C. The Clear Weight of Authority Favors Conducting the Fitness Hearing Prior to the Adjudicatory Hearing, Both as a Preferred State Practice and a Constitutionally Required Rule.

1. Applicability of the Double Jeopardy Clause

Prior to the decisions of this Court in *Benton v. Maryland*, 395 U.S. 784 (1969), and *In re Gault*, 387 U.S. 1 (1967), state courts typically held that the double jeopardy clause of the Fifth Amendment was not applicable to delinquency proceedings. These cases were generally premised upon one of two assumptions: (1) Minors in delinquency proceedings were not protected by the Bill of Rights because said proceedings were considered "civil" and (2) the issue was foreclosed because the double jeopardy prohibition had not been held applicable to state court proceedings.[37] *Gault* and *Benton* undermined the rationale of these decisions, and since 1968 the overwhelming majority of cases[38] and

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[37]See, *e.g.*, *People v. Silverstein*, 121 C.A.2d 140, 262 P.2d 656 (1953); *Moquin v. State*, 216 Md. 524, 140 A.2d 914 (1958); *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943).

[38]*State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972); *State v. Jackson*, 503 S.W.2d 185 (S. Ct. of Tenn. 1973); *People in Interest of P.L.V.*, 176 Col. 342, 490 P.2d 685 (1971); *Richard M. v. Superior Court*, 4 Cal.3d 370, 93 Cal. Rptr. 752 (1971); *Toliver v. Judges of the Family Court*, 59 Misc.2d 104 (N.Y. Fam. Ct. 1969); *Anonymous v. Superior Court*, 10 Ariz. App. 956, 959, 457 P.2d 956 (1969) (dictum); see also *In re Holmes*, 379 Pa. 599, 109 A.2d 523, 526 (S. Ct. of Pa. 1954) (dictum).

articles[39] adopt the view that the protection against twice being placed in jeopardy should be accorded minors in delinquency proceedings.

There has been a greater difference of opinion, at least among the courts, with regard to the implementation of the double jeopardy safeguard in the transfer of jurisdiction context. However, it is fallacious for petitioner to suggest[40] that the weight of authority favors transfer as a dispositional alternative. All of the model acts which address the issue, the great majority of scholarship in the field, and a majority of the court decisions outside of California clearly favor requiring the fitness hearing to be held prior to the adjudication of delinquency.

2. Model Statutes and Scholarly Articles

Recent model acts which specifically address the question unanimously recommend either that the fitness determination be reached prior to the commencement of the adjudicatory hearing, or that the minor not be reprosecuted in adult court for the same offense for which he was convicted as a juvenile. These include: *Model Rules for Juvenile Courts*, Rule 9 (Council of Judges of N.C.C.D., 1968); *Uniform Juvenile Court Act*, Sec. 34(a), 9 Uniform Laws Ann. 429 (master ed. 1973); *Family and Juvenile Court Acts* § 27 (U.S. Gov.

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[39]See, *e.g.*, Comment: *Double Jeopardy and the Juvenile*, 11 Journal of Family Law 603 (1971); Note, *Double Jeopardy in Juvenile Justice*, 1971 Wash. L. Q. 702.

[40]Petitioner's Opening Brief, pp. 45-50.

Print. Office, Children's Bureau Publication No. 472, 1969); *Legislative Guide for Drafting Family and Juvenile Court Acts* § 27 (Dept. of H.E.W., Social and Rehabilitative Service, Children's Bureau Pub. No. 437, 1966); and the *California Juvenile Court Deskbook* § 104 at 148-150 (Cal. College of Trial Judges, 1972). No model act or statute advocates holding the jurisdictional hearing prior to the fitness hearing.

Both the *Standard Juvenile Court Act* § 13 (National Council on Crime and Delinquency in Cooperation with National Council of Juv. Ct. Judges and U.S. Children's Bureau, 6th Ed., 1959) and the *Standard Family Court Act* § 13 (Nat. Prob. and Parole Assn., 1969) prohibit a criminal prosecution based upon the same facts giving rise to the juvenile court petition "except as provided in this section." *Id.* Although this language is not entirely free from ambiguity, one of the chief draftsmen of both acts has indicated that it was not the intention to permit criminal prosecution of the juvenile for the same act for which the juvenile court had previously assumed jurisdiction. See, Sheridan, *Double Jeopardy and Waiver in Juvenile Delinquency Proceedings*, 23 Fed. Probation 43, 45 (Dec. 1959).

Respondent respectfully disagrees with petitioner's assessment that the Children's Bureau's recommendation concerning double jeopardy does not encompass the transfer situation. This contention is controverted by the language of Section 27 of the *Legislative Guide for Drafting Family and Juvenile Court Acts, supra,*

> "Criminal proceedings and other juvenile proceedings based upon the offense alleged in the petition or an offense based upon the same conduct is barred where the court has begun

> taking evidence or where the court has accepted a child's plea of guilty to the petition."

and by the draftsman's comment to this provision,

> "This section is new. It embodies traditional constitutional law concepts as to the time when jeopardy attaches. It is aimed at ensuring that no child will be prosecuted first as a juvenile and then later as an adult or in two juvenile court hearings for the same offense."

Petitioner's statement that the *Model Rules for Juvenile Courts* may reflect "cautious draftmanship" rather than "consideration of the better view"[41] is groundless speculation. As indicated in the brief *amicus curiae* submitted in this case by the Council of Judges of the National Council on Crime and Delinquency, Rule Nine does represent the Council's view of the preferred practice in terms of fairness to the juvenile.

Even if, *arguendo,* the *Standard Juvenile Court Act* does not specifically address the question before this Court, it is inaccurate to assert that there is any variance between Section 13 of the *Standard Juvenile Court Act* (1959) and Rule 9 of the *Model Rules for Juvenile Courts* (1969). Under the construction of the *Standard Juvenile Court Act* most favorable to petitioner, the *Act* would simply not apply to the transfer situation. But the *Model Rules for Juvenile Courts* were published ten years after the *Standard Juvenile Court Act* and clearly reflect the current position of the National Council on Crime and Delinquency.

The weight of scholarship also supports respondent's position. With the exception of Professor Carr,[42] all

[41] Petitioner's Opening Brief, p. 50.

[42] Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. L. REv. 1 (1974).

other scholars and commentators agree that after jeopardy attaches in a delinquency proceeding, future prosecutions for the same offense in adult court are constitutionally precluded. Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 Wm. and Mary L. Rev. 266 (1972); Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 Stan. L. Rev. 874 (1972); Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L. Q. 387, 397-398 (1961); see also Whitebread and Batey, *Juvenile Double Jeopardy*, ____ Illinois Law Forum ____.[43]

3. State Statutes

Only three states require a finding of delinquency before the minor may be transferred to adult court.[44] 17 states require by statute that the juvenile court determine the minor's fitness prior to commencement of the adjudicatory hearing.[45] Two other states have

[43]This article has been submitted for publication in the Spring, 1975 issue of the Illinois Law Forum. Copies of a draft version of the article have been lodged with this Court and sent to counsel for petitioner.

[44]Mass. Ann. Laws, Chap. 119 §61 (1969); West Vir. Code Ann. § 49-5-14 (1974); Alabama Code, Title 13 § 364 (1958).

[45]D.C. Code Ency. § 16,2307(d) (Supp. 1970); Georgia Code Ann. 24 A-2501(a) (Supp. 1974); Ill. Stat. Ann. ch. 37 § 702-7(3) (Supp. 1974); Md. Ann. Code art. 26 § 70-16(a) (1969); Mich. Stat. Ann. § 27.3178 (598.2) (2) (Supp. 1974); Minn. Stat. Ann. § 260.125 (1963); Miss. Code Ann. § 43-21-31 (1972); Mont. Rev. Code Ann. § 10-1229 (Supp. 1974); N.H. Rev. Stat. Ann. § 169.21 (1964); N.M. Stat. Ann. § 2A:448 (Supp. 1974); N.D. Cent. Code § 27-20-34 (1974); Okl. Stat. Ann., Title 10 § 1112(b) (Supp. 1973); Pa. Stat. Ann., Title 10 § 50-325(a)(4) (Supp. 1974); Tenn. Code Ann. § 37-234(a)(4)(i) (Supp. 1974); Texas Family Code § 54.02 (1973); Va. Code § 16.0-176(2) (Cum. Supp. 1974); Wyo. Stat. Ann. § 14-115 38 (Supp. 1971).

reached the same result by judicial decision.[46] Thus, 19 of the 22 states which have specifically addressed the issue require the fitness hearing to be held prior to the jurisdictional hearing.[47]

The statutes of a large number of states contain no requirement for a showing of criminal complicity prior to transfer.[48] In these jurisdictions adjudication prior to transfer is probably an infrequent occurrence.[49] The statutes of a number of other states require a finding of probable cause prior to transfer.[50] It would appear that the legislatures in these states have at least inferentially indicated that a finding of delinquency is unnecessary to support a transfer decision, although they have not prohibited this practice.

In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court noted with more than passing interest that at least 29 states and the District of Columbia deny the juvenile a right to a jury trial in delinquency cases, and that the same result had been achieved in five other states by judicial decision. *Id.* at 548-49. If this Court

[46]*State v. Gibbs*, 94 Idaho 708, 500 P.2d 209 (1972); *State v. Halverson*, 192 N.W.2d 765 (S. Ct. Iowa 1971).

[47]Four states, Louisiana, Nebraska, New York, and Vermont, do not have a procedure for transferring jurisdiction from juvenile to adult court. Statutes in the remaining 24 states do not clearly specify when the transfer hearing must be conducted.

[48]Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. L. Rev. 1, 58 n.325 (1974).

[49]*Id.* at 58.

[50]See, *e.g.*, Alaska Stat. § 47.10.060 (1971); Ariz. Rev. Stat. Ann. § 17, Juv. Ct. Rule 14 (1970); Fla. Stat. Ann. § 39.09(2)(a) (1974); Ky. Rev. Stat. Ann. §208.170 (1973); Me. Rev. Stat. Ann., Title 15 § 2611(3) (1964); N.C. Gen. Stat. § 7A-280 (1969); see also statutes listed in Carr, *supra*, 58-59 n.329.

had imposed a mandatory jury trial requirement upon the juvenile courts, it would have been overruling the laws of 35 jurisdictions. In the case at bar, however, only three states would be required to amend their statutes. More significantly, the procedure constitutionally mandated by the Ninth Circuit is in accord with the statutes of an overwhelming majority of jurisdictions which have legislated as to when the fitness hearing must be held. Information regarding customary practices in other states is incomplete, but it would appear that the practice of holding the fitness hearing initially is consistent with the practices and statutes in these jurisdictions.

4. Judicial Decisions

A number of federal and state courts have held that the federal constitutional prohibition against double jeopardy precludes the government from retrying a minor in adult court after jeopardy has attached at a jurisdictional hearing in juvenile court. *Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973) (*en banc*), *petition for cert. filed* 43 U.S.L.W. 3035 (U.S. August 6, 1974); *Lewis v. Howard*, 374 F. Supp. 446 (W.D. Va. 1974), *rev'g Lewis v. Commonwealth*, 214 Va. 150, 198 S.E.2d 629 (1973); *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972); *United States v. Dickerson*, 168 F. Supp. 889 (D.C.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959). In addition, several decision emanating from the state of Texas have held that it is a violation of fundamental fairness to convict minors as delinquents, hold them in custody until they attain

their age of majority, and then reprosecute them in adult court for the same offenses of which they had been previously adjudicated delinquents. *Hultin v. Beto*, 396 F.2d 216 (5th Cir. 1968); *Sawyer v. Hauck*, 245 F. Supp. 55 (W.D. Tex. 1965); *Garza v. State*, 369 S.W.2d 36 (Tex. Cr. App. 1963).[51]

Petitioner cites six cases in his brief which purportedly support his position.[52] The California cases, *Bryan v. Superior Court*, 7 Cal.3d 575, 102 Cal. Rptr. 831, *cert. den.*, 410 U.S. 944 (1973); and *In re Gary Steven J.*, 17 C.A.3d 704, 95 Cal. Rptr. 185 (1971), as well as *In Re Juvenile*, ____ Mass. ____, 306 N.E.2d 822 (1974), rest upon a continuing jeopardy theory which respondent believes is historically unsupportable and analytically incorrect. This theory will be discussed in part IV, *infra.*

The other three cases cited by petitioner are factually distinguishable and analytically inconsistent with decisions by this Court. In *Carter v. Murphy*, 465 S.W.2d 28 (Mo. Ct. App. 1971), the court held that double jeopardy does not apply to delinquency proceedings at all because such proceedings are not analogous to adversary criminal trials. This rationale is directly contradicted by this Court's decisions in *Gault* and *Winship, supra.*[53]

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[51]The courts relied upon a fundamental fairness rationale in these cases because this Court had not yet decided *Benton v. Maryland*, 395 U.S. 784 (1969), holding the double jeopardy clause applicable to state criminal proceedings.

[52]Petitioner's Opening Brief, p. 48.

[53]Unlike the present case, the minor in *Carter* had been transferred to adult court prior to the adjudication of delinquency.

In re Mack, 22 Ohio App.2d 201, 260 N.E.2d 619 (1970), is even more baldly inconsistent with this Court's jurisprudence since the court there rejected the double jeopardy defense because "[p]roceedings in Juvenile Court are civil in nature and not criminal." *Id.* at 621. The court's decision was also based upon a state statute which specified that transfers were limited to previously adjudicated delinquents. Ohio Rev. Code §21.51.26. Effective January 14, 1972 this statute was amended to permit transfer at any time prior to the order of final disposition. *Id.*, Rules Governing the Courts of Ohio, Rule 30(A).

Finally, *United States v. Dickerson*, 271 F.2d 487 (D.C.Cir. 1959), was decided pre-*Gault* and pre-*Benton v. Maryland*. The statement in *Dickerson* that the double jeopardy protection is inapplicable to criminal proceedings in state court is vitiated by these later decisions. In *Dickerson* the court never directly confronted the issue of whether jeopardy attached during the juvenile court proceeding. This is because the court found that the minor's admission of guilt occurred at a preliminary hearing,[54] was not a guilty plea, and was never accepted by the court as a guilty plea. 271 F.2d at 491. Since the court found that jeopardy had never attached during the proceeding in juvenile court, it was unnecessary for the court to decide whether the minor had been twice placed in jeopardy.

Under the standards articulated in *Gault*, *Winship*, and *McKeiver*, this Court must hold the double

[54] Jeopardy does not attach at a preliminary hearing in a criminal proceeding. *Collins v. Loisel*, 262 U.S. 426 (1923).

jeopardy protection applicable to delinquency proceedings in juvenile court. This conclusion, as well as its corollary that fitness proceedings must precede the adjudicatory stage of delinquency proceedings, is supported by the overwhelming majority of model codes, statutes, and juvenile court scholarship, and is consistent with the vast majority of state legislation. This result will elevate the fairness of juvenile proceedings so as to command the respect of the minor himself. To do less would be a disservice to the juvenile court's own cherished ideals and rehabilitative goals.

III.

RESPONDENT WAS TWICE PLACED IN JEOPARDY IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Once it is determined that the double jeopardy clause applies to delinquency proceedings, the result in this case is controlled by several well-established principles of double jeopardy law. First, the double jeopardy clause protects those who are convicted as well as those who are acquitted.[55] Second, a defendant is placed in jeopardy in a non-jury trial when he has been subjected to a charge before a court competent to try him, and

[55] *Helvering v. Mitchell*, 303 U.S. 391, 398 (1938); *United States v. Ball*, 163 U.S. 662, 669 (1896); *Patton v. North Carolina*, 381 F.2d 636, 644 (4th Cir. 1967), *cert. den.*, 390 U.S. 905 (1968).

that court has begun to hear evidence.[56] Third, a person is placed in jeopardy of life or limb when he is exposed to the risk of conviction and punishment.[57] The fourth principle is equally well-established but is contested by petitioner and, for that reason, requires discussion. It is that the double jeopardy clause protects a person against being tried twice for the same offense – not simply against the peril of a second punishment.

Petitioner contends that the protection afforded by the double jeopardy clause against multiple trials is only intended to implement a policy against multiple punishments. The logical thrust of this argument is that a defendant can be retried repeatedly for the same offense as long as multiple punishments cannot be imposed.

If this principle were embraced by this Court, the efficacy of the double jeopardy clause as a shield against abusive state power would be seriously impaired. The accused will suffer anxiety, embarrassment, and expense [see *Green v. United States*, 355 U.S. 184, 188 (1957)] as a result of duplicate or multiple prosecutions irrespective of whether a more severe penalty is, or can be, imposed. These multiple trials warp a defendant's life [see Note, *Double Jeopardy*, 75 Yale L.J. 262, 279 (1965)]. As Justice Brennan has stated,

> "Obviously separate prosecutions of the same criminal conduct can be far more effectively used

[56] *United States v. Jorn*, 400 U.S. 470, 483 (1971); *Green v. United States*, 355 U.S. 184, 188 (1957).

[57] *Price v. Georgia*, 398 U.S. 323, 327 (1970); *Clawans v. Rives*, 104 F.2d 240, 242 n.4 (D.C. Cir. 1939).

> by a prosecutor to harrass an accused than can the imposition of consecutive sentences for various aspects of that conduct." *Abbate v. United States*, 359 U.S. 187, 198-99 (1959) (dissenting opinion).

There is no basis historically for petitioner's claim that the double jeopardy clause was intended to protect the accused against multiple prosecutions only where there was the potential for multiple punishment:

> "... the plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be ... is a good plea in bar to an indictment." II *Blackstone's Commentaries*, sec. 379, 2571 (Jones ed. 1916).[58]

The maxim that a man should not be twice placed in jeopardy for the same offense was accepted in *Vaux*'s case, 4 Co. Rep. 44a, 45a, 76 Eng. Rep. 992, 993 (K.B. 1591), and was applied in *Wemyss v. Hopkins*, L.R. 10 Q.B. 378 (1875), which involved a prosecution for unlawful assault emanating from the same incident for which the defendant had been convicted of unlawful misconduct.

In America the double jeopardy clause, proposed by James Madison on June 8, 1789, clearly forbade duplicate trials for the same offense:

> "No person shall be subject, except in cases of impeachment, to more than one punishment *or* [emphasis supplied] trial for the same offense." Annals of Cong. 434 (1st Cong.).

[58] Other commentaries are to the same effect. See *Hawkins' Pleas of the Crown*, ch. 36, 524 (London, 1824); Coke, *The Third Part of the Institutes of the Laws of England*, ch. 101, 214 (London 1809).

Eghart Benson of New York, Roger Sherman of Connecticut, and Theodore Sedgwick of Massachusetts led the opposition to this language only because it seemed to curtail the defendant's right to an appeal and a second trial if the first trial contained reversible error. Sigler, *Double Jeopardy, The Development of a Legal and Social Policy* 30 (Cornell U. 1969). The language of the double jeopardy clause was changed to accommodate their concerns, but Madison's original intention to preclude more than one trial for the same act was carried forward in the new language. *Id.* at 30-32.

Numerous decisions of this Court have subsequently echoed the statement in *United States v. Ball*, 163 U.S. 662, 669 (1896), that,

> "The prohibition [against double jeopardy] is not against being twice punished, but against twice being put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

See, *e.g.*, *Price v. Georgia*, 398 U.S. 323, 326 (1970); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Downum v. United States*, 372 U.S. 734, 736 (1963); *Green v. United States*, 355 U.S. 184, 187, 203 (1957); *Kepner v. United States*, 195 U.S. 100 (1904); *In re Nielson*, 131 U.S. 176, 188 (1889). It is true, as petitioner suggests, that these cases did involve the potential for multiple punishment. But see *O'Clair v. United States*, 470 F.2d 1199 (1st Cir. 1972), *cert. den.*, 412 U.S. 921 (1973) [double jeopardy clause precludes imposition of two convictions for same offense even where concurrent sentences imposed]. This purported distinction, however, turns upon the anomaly that prosecutors will obviously have little

reason to seek a retrial where increased punishment is not a possibility. The rationale of the previously cited decisions clearly rests upon the prohibition against multiple trials, and not merely multiple punishments.

> "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense." *Kepner v. United States*, 195 U.S. 100, 130 (1904).

Contrary to petitioner's contentions, *In re Nielson*, 131 U.S. 176 (1889), did not turn upon the fact that the defendant was sentenced to 125 days imprisonment after having served three months on his prior conviction for the same offense. In reversing defendant's second conviction, this Court did not mention the multiple punishments. Instead, this Court stated,

> ". . . where as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." 131 U.S. at 188.

In *Price v. Georgia*, 398 U.S. 323 (1970), this Court emphasized that the "twice put in jeopardy" language of the Constitution relates to a *potential* risk that an accused will be convicted of the same offense for which he was initially tried. *Id.* at 326. Because the clause protects against potential risks of conviction, this Court held that the state could not retry a defendant for murder after he had obtained a reversal of a

manslaughter conviction which had been entered upon a murder indictment. It was considered immaterial for double jeopardy purposes that the defendant had not been punished, or even convicted of murder, because the Constitution protects him against "a risk of conviction." *Id.* at 327.[59]

Under *Price*, *Jorn* and *Downum*, *supra*, Jones was clearly placed twice in jeopardy. He not only faced a potential risk of punishment during each of his trials, but, in fact, he has suffered the indignity of two convictions. Even if, as petitioner asserts, California's statutory scheme precludes the possibility of multiple punishment, Jones was placed in jeopardy during both the adjudicatory hearing in juvenile court and his trial in adult court.

It should be emphasized, however, that the California transfer scheme in fact authorizes multiple punishment in two distinct ways. First, Jones spent approximately six weeks in juvenile hall before he was found unfit to be treated as a juvenile (App. 15-30) solely because of the state's decision to put him through an unnecessary jurisdictional hearing in juvenile court. Under California law he did not receive any credit for this time towards his commitment to the California Youth Authority.

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[59]For the same reason this Court has held that the double jeopardy clause forbids duplicate trials for the same offense where the first trial has been improperly aborted by the prosecutor or the court. This result has been required even though the initial trial did not result in a conviction, and even where there was no indication that the defendant might actually suffer multiple punishments. *United States v. Jorn*, 400 U.S. 470 (1971); *Downum v. United States*, 372 U.S. 734 (1963); see, *Green v. United States*, 355 U.S. 184 (1957).

This constituted a more severe additional punishment than was suffered by the defendant in *Waller v. Florida*, 397 U.S. 387 (1970).[60]

Second the California fitness statute does, as previously noted,[61] authorize transfer of a delinquent minor to the criminal justice system even after he has served time in a juvenile institution. W&L Code §§707, 1737.1; *Bryan v. Superior Court*, 7 Cal.3d 575, 102 Cal. Rptr. 831 (1972), *cert. den.*, 410 U.S. 944 (1973). Minors tried in juvenile court who otherwise qualify for transfer confront the possibility of serving time in both juvenile and adult correctional institutions. *Id.* Since jeopardy is measured by the risk of conviction or punishment, and not by its actuality [see *Price v. Georgia, supra*], Jones clearly was exposed to the possibility of double punishment.

In the present case several of the basic tenets of double jeopardy law have been flouted. Jones has been tried twice in connection with the same incident. He has been twice convicted of the same, underlying offense. He has run the gauntlet of potentially severe double punishment. And he has served an additional six weeks in confinement which would have been avoided if he had been tried only once. Jones' case is a graphic

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[60]In *Waller* the defendant was convicted in both a municipal court and a state court in connection with the same incident. He was sentenced by the municipal court to 180 days in county jail. The state court sentenced him to a term of six months to five years but gave him credit for 170 of the 180 days sentence previously imposed. Hence, the defendant in *Waller* served an additional 10 days imprisonment as a result of his prior conviction, far less than respondent in the present case.

[61]pp. 27-28, *supra*.

illustration of double jeopardy in classic constitutional terms.

IV.

THE CONTINUING JEOPARDY THEORY SHOULD NOT BE EXTENDED BEYOND ITS PURPOSE IN ORDER TO SANCTION SUCCESSIVE TRIALS FOR THE SAME OFFENSE.

The only plausible legal theory which has been advanced to support petitioner's position is that the entire proceeding in juvenile and adult court involves a single, continuing jeopardy.

> "... assuming jeopardy attached during the preliminary juvenile proceeding, and further assuming all rights constitutionally assured to an adult accused of crime are to be enforced and made available to a juvenile, it is clear that no new jeopardy arose by the juvenile proceeding sending the case to the criminal court. Such transfer neither acquitted nor convicted and could not in any event represent a second trial for the same offense or more than a continuing jeopardy for a single offense." *Jones v. Breed*, 343 F. Supp. 690, 692 (C.D. Cal. 1972); see also *Bryan v. Superior Court, supra* at 583; *In re Gary Steven J.*, 17 C.A.3d 704, 710, 95 Cal. Rptr. 369 (1971); *In re Juvenile*, ____ Mass. ____, 306 N.E.2d 822, 829 (1974).

The continuing jeopardy theory strikes at the very heart of the prohibition against twice placing a person in jeopardy since it sanctions multiple trials for the

same offense as long as the initial jeopardy is "continuing." There is no way in which this interpretation of the double jeopardy clause can be reconciled with numerous decisions by this Court holding that the constitutional guarantee protects against multiple trials, and not merely against multiple punishments. *Note, supra*, 24 Stan. L. Rev. 874, 888 (1972), See, *e.g., Price v. Georgia*, 398 U.S. 323, 326 (1970); *Green v. United States*, 355 U.S. 184, 187 (1957); *In re Nielson*, 131 U.S. 176, 188 (1889).

The continuing jeopardy theory is analytically unsound because the decision as to whether there is a single, continuing jeopardy turns upon whether the initial proceeding resulted in a final disposition of the case. See, *e.g., In re Gary Steven J., supra*,at 710; *Jones v. Breed, supra*, at 692. The decisions applying the continuing jeopardy theory have misinterpreted the essence of the double jeopardy safeguard by insisting there must be an acquittal, a conviction, or some other "final" disposition before a second trial would be constitutionally forbidden. *Id.* Numerous decisions by this Court have held that once jeopardy attaches, a subsequent prosecution is prohibited irrespective of whether these initial proceedings culminate in "final" orders or judgments. See, *e.g., United States v. Jorn*, 400 U.S. 470 (1971); *Downum v. United States*, 372 U.S. 734 (1963); *Green v. United States, 355 U.S. 184 (1957)*. As long as the defendant is in peril of punishment, jeopardy attached; and a second prosecution for the same offense is barred.

The theory of continuing jeopardy was, apparently, first expounded in this country by Justice Holmes in his dissenting opinion in *Kepner v. United States*, 195

U.S. 100 (1904). In that case the defendant, a lawyer in the Philippine Islands,[62] was tried and acquitted of embezzlement. The People appealed pursuant to a Philippine statute, and the Supreme Court of the Philippine Islands reversed. On retrial the defendant was convicted and sentenced to imprisonment. A majority of this Court reversed, finding an infringement of the protection against double jeopardy.

> "The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense." *Id.* at 130.

In his dissenting opinion, Justice Holmes set forth his view of continuing jeopardy.[63] For present purposes, it is important to recognize that the continuing jeopardy theory expounded by Justice Holmes was rejected by a majority of the Court in *Kepner* and has never been embraced subsequently by a majority of this Court.

> "... he [Justice Holmes] did dissent from the holding in *Kepner* that the Government could not appeal an acquittal – on the ground that a new trial after an appeal by the Government was part of the continuing jeopardy rather than a second

[62]Although the case was decided under a Philippine statute, the statute contained a double jeopardy clause almost identical to that found in the Fifth Amendment. This Court assumed that this clause was identical in meaning to the double jeopardy provision of the Bill of Rights. 195 U.S. at 124.

[63]"... it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same case, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everyone agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man has already been tried once. But there is no rule that a man may not be tried twice in the same case." *Id.* at 134.

> jeopardy. But that contention has been consistently rejected by this Court." *Green v. United States*, 355 U.S. 184, 196 (1957).[64]

The continuing jeopardy theory, despite its uncertain analytical underpinnings, has played a small – but useful – role in a carefully delimited factual context. There has always been a recognized exception to the double jeopardy protection whereby the state has been permitted to reprosecute a defendant who obtains a reversal of his conviction on appeal. Formerly, most courts justified this practice by holding that the defendant had waived his right to plead former jeopardy to the new indictment by filing his notice of appeal. *Trono v. United States*, 199 U.S. 521 (1905); *Stroud v. United States*, 251 U.S. 15 (1919); *Howard v. United States*, 372 U.S. 294, 298 (9th Cir. 1967), *cert. den.*, 388 U.S. 915 (1967).

However, the waiver theory has consistently been subjected to criticism because it coerced surrender of the double jeopardy protection in order to assert one's right to appeal. This Court has found that it is a fiction to claim that by appealing his conviction a defendant "chooses" to waive his right not to be retried. *Green v. United States*, 355 U.S. 184, 192 (1957); *Benton v. Maryland*, 395 U.S. 784, 811, 812 (1969) (White, J., concurring); *Trono v. United States*, 199 U.S. 521, 539 (1905) (McKenna, J., dissenting). The waiver theory has been viewed increasingly as inconsistent with the notion that fundamental constitutional rights may only be

[64]In fact, Justice Black later states in the same opinion that Justice Holmes' continuing jeopardy theory has never actually been adhered to by any other justice of the Court. 355 U.S. at 197.

voluntarily and intelligently waived. Cf. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Nevertheless, society retains its interest in retrying a defendant who obtains a reversal of his conviction on appeal. Such a result has been found to be in the best interests of the public, the courts, and even the defendant.

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to a conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." *United States v. Tateo*, 377 U.S. 463, 466 (1964); see also *Benton v. Maryland*, 395 U.S. 784, 811-812 (1969) (White, J., concurring).

In order to vindicate these unquestionable societal interests, courts continue to permit retrials following reversals on appeal. With increasing frequency, however, this result has been justified by invoking a continuing

jeopardy theory, rather than the now discredited theory that the defendant has, by appealing his conviction, waived his rights. See, *e.g., Price v. Georgia*, 398 U.S. 323, 327 (1970); *Rivers v. Lucas*, 477 F.2d 199, 202 (6th Cir. 1973), *rev'd and remanded on other grounds*, 414 U.S. 896 (1973); *United States v. Berry*, 309 F.2d 311, 313 (7th Cir. 1962), *cert. den.*, 380 U.S. 957 (1965); *State v. Aus*, 105 Mont. 82, 69 P.2d 584 (1937). However, the continuing jeopardy theory has been strictly limited to the retrial following appeal situation. This Court has aptly noted,

> "... recognition that the defendant can be re-prosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching," *United States v. Jorn*, 400 U.S. 470, 484 (1971).

Although petitioner urges this Court to extend the continuing jeopardy theory beyond its original function, he does not cite a single criminal case in which this has been sanctioned. This is not surprising since Justice Holmes' advocacy of the continuing jeopardy theory in *Kepner, supra*, was strictly limited to the facts in that case where a statute authorized the government to appeal acquittals. Holmes also was critical of the waiver theory [195 U.S. at 135-136]; his holding was simply that, "... a statute may authorize an appeal by the Government from the decision by a magistrate to a higher court as well as an appeal by a prisoner." 195 U.S. at 136. Holmes indicated explicity that where there is no appeal by the state or defendant, the continuing jeopardy theory is inapplicable:

> "There is no doubt that the prisoner is in jeopardy at the trial before the magistrate [the first trial], and that a conviction or acquittal not appealed would be a bar to a second prosecution." *Id.*

Welfare and Institutions Code §707 requires that the juvenile court dismiss a delinquency petition before a minor may be prosecuted in adult court. The second prosecution of the minor occurs in a different court and is based upon a new pleading. As one commentator has stated,

> "When the juvenile court judge enters a finding of nonamenability and the juvenile petition is dismissed, subsequent criminal action is based on a new complaint alleging the same facts. Even under Holmes' formulation this would not be continuing jeopardy since each prosecution proceeds from the authority of a different complaint." Note, *supra*, 24 Stan. L. Rev. 874, 888 (1972).

Although petitioner is correct in pointing out that even a retrial following appellate reversal does not involve a *continuous* jeopardy,[65] this serves only to emphasize the chimerical nature of the continuing jeopardy theory.

Moreover, the continuing jeopardy theory is inconsistent with this Court's decisions in *Waller v. Florida*, 397 U.S. 387 (1970), and *Robinson v. Neil*, 409 U.S. 505 (1973). In those cases this Court held that a defendant cannot be tried twice for the same offense in two separate courts. Petitioner seeks to distinguish *Waller* upon the basis that there the felony indictment was sought to obtain a greater sentence than that imposed in municipal court.[66] But that is equally true in the

[65] Petitioner's Opening Brief, p.32.

[66] *Id.*, p.34.

present case. As a ward of the juvenile court Jones could only be held until his twenty-first birthday (W&I Code §1769), whereas the crime of robbery is punishable in superior court by imprisonment from five years to life. Cal. Penal Code §213.

Petitioner urges that *Waller* can be distinguished because in that case there was no judicial decision bridging the gap between courts.[67] However, the double jeopardy clause is intended to protect defendants against multiple prosecutions. Its protective armor does not depend upon the identity of the person who sanctions the reprosecution. If a judge determines that a defendant should be continuously prosecuted for the same offense, his action is no more exempt from the double jeopardy prohibition than if the same action were initiated by the district attorney.[68]

Neither can it make any difference that an unconstitutional act is sanctioned by state statute. Under petitioner's analysis, a state could legislate that at the conclusion of every misdemeanor trial, the judge may, instead of imposing sentence, remand the defendant for a felony prosecution. This procedure, factually indistinguishable from the case at bar, is patently violative of the right not to be twice placed in jeopardy.

In applying constitutional guarantees to the juvenile court, this Court has assiduously avoided creating

[67] *Id.*

[68] In most instances it is the district attorney who will ask the court to transfer the juvenile under W&I Code §707. See, *e.g.*, *Donald L. v. Superior Court*, 7 Cal.3d 595, 102 Cal. Rptr. 850 (1972).

divergent standards for adults and minors. To sanction reprosecution for the same offense in this case would be to undermine the very essence of the double jeopardy prohibition. The imprecise underpinnings of the continuing jeopardy theory contain few, if any, inherent limitations. To sanction an extension of this amorphous doctrine beyond its original, well-defined parameters would invite adulteration of one of the most fundamental and hallowed protectors of human liberty.

CONCLUSION

For the above stated reasons, respondent Jones urges that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S CLOSING BRIEF

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PETITIONER'S CLOSING BRIEF

ARGUMENT

Due Process Does Not Mandate a Transfer Hearing Prior to Adjudication of Delinquency

Although the issue in this case is the nature of due process to be accorded respondent Jones as an adult criminal defendant, the mode of analysis employed in the *Gault-Winship-McKeiver** trilogy is relevant here because of the significant collateral effect this case could have on the future operations of the juvenile court if double jeopardy were held to bar post-adjudication transfers such as occurred in this case. The *Gault-*

**In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

//

Winship-McKeiver mode of analysis serves to fortify the conclusion that application of the principle of continuing jeopardy to post-adjudication transfers is fully consistent with fundamental fairness. Additionally, this mode of analysis indicates that the burden on the juvenile court in terms of the additional hearings and reduced flexibility would militate against the application of the double jeopardy sanction even if the continuing jeopardy principle did not except this case from the operation of double jeopardy.

Respondent Jones misconceives petitioner's basic point when he asserts that petitioner's reliance on *McKeiver* is somehow misplaced because of petitioner's argument that the *Gault-Winship-McKeiver* trilogy is not directly germane to the resolution of the issue raised in this case. (Resp. Br. p. 10.) Petitioner's point, however, is that the determination of the content of due process with respect to the application of double jeopardy at respondent's adult criminal trial cannot be made in isolation. There will be an effect on the juvenile court system, and that effect should be weighed in the due process balance.

A. A Mandatory Preliminary Hearing Procedure Will Only Add to the Congestion of an Already Overburdened Juvenile Court

Both parties are in agreement that, if double jeopardy were held to bar a post-adjudication transfer of a minor from juvenile court to adult court, this determination would constitutionally mandate that the issue of transfer be conclusively determined prior to the adjudication of delinquency. Such a constitutionally mandated procedure would produce serious repercussions for the juvenile court.

It must be acknowledged that a preliminary hearing on the issue of transfer may be appropriate in some cases. Petitioner's point is that it is clearly not appropriate for *all* cases. The cases where it is not appropriate are those cases in which the minor is alleged to have committed one of the more serious felonies, such as murder or robbery. The criteria for transfer include many of the same factual matters that will normally be adduced at the delinquency adjudication hearing. (*See* Petn. Op. Br. p. 43.) If the juvenile court judge thoroughly considers the circumstances and details surrounding the crime and the minor's degree of sophistication in deciding whether to transfer or not, he will hear essentially the same evidence later to be reheard on the issue of guilt or innocence at the delinquency adjudication hearing. Under these circumstances, the two hearings will duplicate one another. By treating transfer as a dispositional alternative, the judge in this case avoided such duplication.

Although lengthy and duplicative hearings will not necessarily be the result in every juvenile court case where transfer is determined at the outset, there is every reason to believe that juveniles charged with serious felonies will demand and receive full-blown, adversary hearings on all of the factors relevant to transfer. Otherwise these hearings will fail to satisfy due process insofar as *Kent v. United States*, 383 U.S. 541 (1966) sets the standard by requiring a full and fair hearing before transfer. One would have to assume, as respondent does, that transfer hearings will always be summary, *pro forma* affairs in order to conclude that there will be no great additional burden on the juvenile court system from the imposition of mandatory preliminary transfer hearings. (*See* Resp. Br. pp. 32-35.)

Respondent Jones asserts that "As any seasoned trial judge knows, a full-blown trial takes far more time than a hearing which is concerned with sentencing or disposition." (Resp. Br. p. 35.) A principal reason why a sentencing hearing is ordinarily shorter is that the judge has had an opportunity to appraise the circumstances surrounding the commission of the crime and the defendant's degree of involvement during the course of the trial. When he has his observations from the trial to draw upon at the time of sentencing, there is no need for an extended hearing to go over ground already covered. In the same way, the transfer hearing in the instant case could be relatively brief when held after the conclusion of the adjudicatory hearing. When the transfer hearing is held before the adjudicatory hearing, however, the judge cannot fall back on any background gained at a prior hearing. He must obtain the background information he needs from the evidence presented at the preliminary transfer hearing, and this process will always consume more time because the judge will not have heard any of the evidence previously.

Not only will preliminary hearings in serious felony cases tend to take up more time, but they will also require a different judge for the transfer and adjudication hearings in each case where the juvenile court decides against transfer. Respondent concedes that this burden is a real one. (Resp. Br. pp. 35-37.) He offers no suggestion as to how this administrative nightmare might be mitigated.

Respondent also argues that more minors will be likely to admit their guilt, and thus avoid the need for a delinquency adjudication, if a final decision on transfer is made prior to the adjudication hearing. (Resp.

Br. pp. 23, 39.) This assertion is wholly speculative and chimerical. Common sense suggests that a juvenile charged with conduct amounting to a serious felony is not going to be any more likely to admit his guilt just because the possibility of transfer has been removed from the case. After all, such a youthful offender still faces the possibility that the juvenile court may commit him to the California Youth Authority for a period that may not end with his 21st birthday. Cal. Welf. & Inst. Code §§ 1769, 1800.

B. There Is No Denial of Due Process Inherent in a Juvenile's Having to Choose Whether or Not to Present a Defense During Delinquency Proceedings Held Prior to Transfer

Respondent Jones contends that the possibility of transfer after the delinquency adjudication either "chills" the presentation of an effective defense or permits the prosecution to preview his defense—a Hobson's choice. (Resp. Br. pp. 4-27.) The fallacy of this argument is obvious. This dilemma will not be removed by mandating that all transfer hearings must precede the adjudication of delinquency. To resist transfer at a preliminary hearing, the juvenile will still have to preview his defense if he attempts to show that the circumstances of the crime or his degree of involvement are such as not to warrant transfer. Indeed, in every case where the principle of "continuing jeopardy" has been applied to permit a retrial after appeal, the defendant has previewed his defense. Yet there is no violation of due process in these cases.

Moreover, in this case respondent Jones claims that he:

> ". . . was unaware at the time of the arrest that he would face a criminal prosecution. Indeed, the

> underlying assumption of both Jones and his counsel was that he would be tried as a juvenile and if convicted, treated as a ward of the juvenile court." (Resp. Br. p. 21.)

If this assertion in the brief is accurate, then the possibility of adult proceedings exerted no "chill" whatsoever on the exercise of his right to testify in his own behalf or to present a defense. Moreover, in this case, respondent Jones did testify at the adjudicatory hearing on the issue of delinquency held in juvenile court. (App. p. 18.) That testimony was *not* used against him in the criminal court proceedings which led to his armed robbery conviction. (*See* App. pp. 48-60.)

Conclusion

For the reasons expressed in both of petitioner's briefs, petitioner urges that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

v.

GARY STEVEN JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR AMICUS CURIAE NATIONAL COUNCIL OF JUVENILE COURT JUDGES

INTRODUCTORY STATEMENT

This brief *amicus curiae* is submitted, pursuant to written consents of both parties filed with the Clerk, on behalf of the National Council of Juvenile Court

Judges.[1] The facts of the case, the pertinent constitutional and state statutory provisions, the questions presented, and the various opinions rendered below are set out in the petition for certiorari, petitioner's brief, and the joint appendix which have been filed with the Court.[2] The *amicus* accepts them for the purposes of its own brief.

THE INTEREST OF THE AMICUS AND ITS POSITION ON THE QUESTION PRESENTED

A. *Interest of the Amicus.* The National Council of Juvenile Court Judges is an unincorporated association. More than 1500 of its members are judges vested with jurisdiction to determine juvenile cases in the various states and the District of Columbia. The judges who are members of the Council handle approximately 90% of the juvenile cases that are filed each year in the courts of the Nation.

It has long been the Council's position that the informality and flexibility which are needed to fulfill adequately the juvenile court's rehabilitative functions must be carefully circumscribed by essential fairness. In pursuing this objective, on various occasions the Council has provided legislatures and courts of last resort with

[1] Hereinafter referred to either as "*amicus*" or the "Council".

[2] The decisions below which have been printed are officially reported as follows: *In re* Gary Steven J., 17 Cal. App.3d 704, 95 Cal. Rptr. 185 (1971), *habeas denied, sub nom.*, Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974).

its members' collective knowledge about the practical problems arising from the special place that the law assigns to children.

B. *The Position of Amicus on the Issues.* The central issue in this case is whether the double jeopardy clause should have barred the trial of respondent in a criminal court on the same charge for which he was adjudicated a delinquent[3] in a juvenile court. The Council urges the Court to hold that the double jeopardy protection does bar a criminal trial after a juvenile has been adjudicated a delinquent in a juvenile court.

The double jeopardy problem arose in this case because the juvenile court below followed a procedure now used in a minority of states: *i.e.*, it transferred[4] respondent to a criminal court *after* he had been adjudicated a delinquent in the juvenile court. If this Court bars the resulting criminal trial, as a practical matter, it will require the practice now followed in a majority of the states, the District of Columbia, and the

[3] In most jurisdictions a juvenile is "delinquent", *inter alia*, if he has violated a federal, state, or local criminal statute. *See, e.g.*, Cal. Welf. and Inst'ns. Code § 602 (Supp. 1973). Delinquency is determined at a hearing which is the equivalent of a criminal trial, except that the juvenile has no right to a jury determination. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Brown v. Cox, 481 F.2d 622, 630 (4th Cir. 1973).

[4] In nearly every jurisdiction, the juvenile court has the authority to terminate its proceedings and refer the juvenile for prosecution as an adult. *See* statutes cited in Davis, Rights of Juveniles: The Juvenile Justice System 105-109 (1974). This process has been referred to as certification, referral, bindover, waiver, and transfer. For the purposes of this brief, the process will be termed "transfer."

federal government of transferring juveniles to an adult court *before* a hearing on the issue of delinquency. In this brief, we refer to the more prevalent practice of transfer before an adjudication of delinquency as a "prior transfer," and urge that its use best safeguards the interests and rights of juveniles.

Although claims of inefficiency and inconvenience are of doubtful relevance when a defendant asserts an established and fundamental constitutional right in a criminal court, petitioner raises such claims about prior transfer as justification for withholding the double jeopardy right from respondent. *Amicus*, consisting largely of practicing juvenile court judges who have extensive experience with the everyday functioning of juvenile courts, is uniquely qualified to put to rest petitioner's contentions in this regard. *Amicus* agrees with Congress, and the majority of the state legislatures, scholars, and experts, who not only believe that the requirement of prior transfer will not significantly interfere with the operation of the juvenile justice system, but also that it is the most efficient transfer procedure to be used in juvenile courts. Therefore, the Council urges this Court to affirm the decision below. A reversal could have far-reaching detrimental effects to our system of juvenile justice, both from the standpoint of the operation of juvenile courts and the protection of the rights of juveniles.

SUMMARY OF ARGUMENT

I.

A. *Amicus* agrees with respondent's assertions that the double jeopardy clause of the Fifth Amendment should have protected him from a trial in a California criminal court on the same charge for which he was adjudicated a delinquent in a California juvenile court. This Court has held that the federal double jeopardy protection applies to state criminal courts through the due process clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). Moreover, the Court has concluded that the protection not only bars retrial within the same criminal court system, but it also bars a trial in a state criminal court when initial jeopardy attached in a non-criminal proceeding within the same state. *See, e.g., Waller v. Florida*, 397 U.S. 387 (1970). Therefore, if the Court finds that jeopardy attached in the California juvenile proceeding below, it must hold that it was error for respondent to be retried in the California criminal court.

B. An accused is placed in jeopardy during any governmental proceeding in which the tribunal has authority to impose serious restrictions on liberty. *See, e.g., United States v. Levy*, 268 U.S. 390, 393-94 (1925). This Court has often held that a juvenile court can impose severe restrictions upon a juvenile's liberty after a finding of delinquency has been entered. *See, e.g.*, In re *Gault*, 387 U.S. 1, 36, 50 (1967). Therefore, as petitioner has conceded below and in his brief before this Court, jeopardy attached during the proceedings in which respondent was found delinquent.

C. The "continuing jeopardy" doctrine, approved in *Price v. Georgia*, 398 U.S. 323 (1970), does not apply to the instant case. That doctrine has been limited by this Court to a retrial after an appeal, *see, e.g., Kepner v. United States*, 195 U.S. 100 (1904), because it is premised on a theory of "limited" waiver. 398 U.S. at 325 n. 4. Respondent did not "waive" his double jeopardy right in the instant case. It was the juvenile court, not the respondent, who sought his transfer to an adult court. Moreover, the policies underlying continuing waiver – the prohibition of a retrial on a more serious offense and the fear of allowing the guilty to go free – have no application to the case at bar.

Finally, the fact that respondent was not sentenced in the juvenile court system is irrelevant. The double jeopardy clause not only protects against multiple punishments, but against multiple trials. *Id.* at 331. A major policy underlying the clause is the prevention of "heavy personal strain" stemming from retrials for the same offense. *See, e.g., United States v. Jorn*, 400 U.S. 470, 479 (1971). Certainly, respondent was placed under great strain when forced to defend himself in separate court systems.

II.

Petitioner asserts in the alternative that even if the continuing jeopardy doctrine does not apply, the second trial should be allowed because to find otherwise might have an adverse indirect impact on the juvenile court system. However, adverse consequences to juvenile courts are not relevant in this case, for the

right at issue has already been incorporated into the Fourteenth Amendment and applied to State criminal courts to bar retrials after convictions in non-criminal proceedings. *See, e.g., Waller v. Florida, supra.*

But if this Court finds that it must consider collateral and indirect consequences to juvenile courts to determine whether respondent's criminal trial should have been barred, it should not adopt the test suggested by petitioner. Borrowing a standard from In re *Gault, supra*, In re *Winship*, 397 U.S. 358 (1970), and *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), petitioner would disallow the application of the double jeopardy right to the adult court, because the exercise of that right requires a transfer before a delinquency determination in a juvenile court. Petitioner claims such a requirement would disrupt the juvenile court.

However, *Gault, Winship*, and *McKeiver* are inapplicable to this case because they involved situations in which juveniles wanted to assert certain rights where those rights had never before been recognized – in a juvenile court. Here respondent seeks to assert a fundamental right in an adult criminal court, where the right clearly applies. The State, at a minimum, would have to demonstrate a compelling interest to defeat the applications of such a recognized right. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

III.

However, petitioner can show neither a compelling state interest to allow the continued use of transfer to

an adult court after an adjudication of delinquency nor that the use of a transfer before a delinquency adjudication would seriously disrupt California's juvenile justice system. Further, it is clear that the use of transfer after a delinquency hearing is fundamentally unfair to juvenile defendants.

A. The most significant evidence demonstrating the acceptability of a transfer before an adjudication of delinquency is that the procedure is required in twenty-eight states, the District of Columbia, and the federal courts. Only two states require that the transfer hearing be conducted after an adjudication of delinquency, and between three and fifteen jurisdictions permit the latter practice. Also, all recent model juvenile court acts and almost every legal commentator who has addressed this issue recommend the use of transfer prior to a delinquency determination.

B. The practical problems raised by the petitioner concerning the use of transfer prior to a delinquency determination are not significant, even to authorities in California, as is evidenced by the fact that the California Supreme Court, the California College of Trial Judges, and the former presiding judge of the Los Angeles Juvenile Court have all expressed a preference for the use of prior transfer.

C. The use of transfer after conviction is unfair to the juvenile, and at the same time impedes the juvenile court's fact-finding capabilities. When transfer decisions are made after a determination of delinquency, a juvenile runs the risk of exposing his entire case to the state, only to find that he will be retried at a later date in a criminal court by the same prosecutor. Such

exposure, in and of itself, constitutes a denial of due process. Moreover, a child, realizing that there is always a chance he may be transferred to an adult court, may tend to be reticent with juvenile court officials, thereby hampering the Court's ability to determine accurately whether the juvenile is a delinquent and the rehabilitiative treatment that may be required.

ARGUMENT

I.

THE DOUBLE JEOPARDY CLAUSE PRECLUDES A TRIAL IN AN ADULT CRIMINAL COURT PERTAINING TO THE SAME OFFENSE FOR WHICH THE DEFENDANT HAS BEEN ADJUDICATED A DELINQUENT IN A JUVENILE COURT.

A. The Double Jeopardy Clause Has Been Incorporated into The Fourteenth Amendment To Apply to State Criminal Proceedings.

Respondent claims that the double jeopardy clause of the Fifth Amendment should have protected him from a trial in a California criminal court on the same charge for which he was adjudicated a delinquent in a California juvenile court. *Amicus* agrees that if jeopardy attached at the juvenile court proceeding, then the later trial of respondent in a criminal court should have been barred by double jeopardy.

The double jeopardy clause is "one of the oldest [procedural guarantees] found in western civilization."[5] It provides: "[N]or shall any person be subject for the

[5] Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J. dissenting).

same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST., amend. V. The clause, *inter alia*, proscribes reprosecution pertaining to the same offense for which an accused has been acquitted[6] or convicted.[7]

In *Benton v. Maryland*, 395 U.S. 784, 794 (1969), this Court held that the double jeopardy prohibition, which "represents a fundamental ideal in our constitutional heritage . . .", is incorporated within the due process clause of the Fourteenth Amendment and thus is binding on the states. There is now no question, therefore, that the protection applies to California criminal proceedings. Moreover, this Court has made it clear that the protection applies not only to a retrial within the same state criminal court, but also to a trial in a state criminal court when initial jeopardy attached in a non-criminal proceeding conducted in the same state. *See, e.g., Robinson v. Neil*, 409 U.S. 505 (1973); *Waller v. Florida*, 397 U.S. 387 (1970). *Cf. Grafton v. United States*, 206 U.S. 333 (1907).

Respondent, relying upon this well-established body of law, asserts the right to be free from a trial in a California criminal court pertaining to the same offense for which he claims initial jeopardy attached in a non-criminal proceeding within the same state – his delinquency hearing in the California juvenile court.

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[6] *See, e.g.*, United States v. Sisson, 399 U.S. 267 (1970); Benton v. Maryland, 395 U.S. 784 (1969); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Fong Foo v. United States, 369 U.S. 141 (1962); Green v. United States, 355 U.S. 184 (1957).

[7] *See, e.g.*, North Carolina v. Pearce, *supra; In re* Nielsen, 131 U.S. 176 (1889).

Clearly, respondent has a right to be free from double jeopardy in an adult criminal court. Indeed, petitioner concedes respondent's entitlement to the right: "As an adult criminal defendant, *Benton v. Maryland* clearly established [respondent's] right to the protection of the Fifth Amendment guarantee against double jeopardy." Petitioner's Brief at 16. Therefore, if jeopardy attached in the California juvenile court below, respondent should not have been tried in the California criminal court on the same charge for which he was adjudicated a delinquent.

B. Jeopardy Attached in The Juvenile Court Below.

An accused is placed in jeopardy during any governmental proceeding in which the tribunal has authority to impose serious restrictions upon his liberty. *See, e.g., United States v. Levy*, 268 U.S. 390, 393-94 (1925); *Collins v. Loisel*, 262 U.S. 426, 429 (1923); *Grafton v. United States*, 206 U.S. 333, 345-49 (1907); *Brown v. Cox*, 481 F.2d 622, 631 (4th Cir. 1973).[8]

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[8] In a jury trial, jeopardy attaches when the jury has been impaneled and sworn. *See, e.g.*, Downum v. United States, 372 U.S. 734 (1963); Newman v. United States, 410 F.2d 259, 260 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 868 (1969); United States v. Lewman, 334 F. Supp. 612, 614 (E.D.Pa. 1971); People v. Friason, 22 Ill.2d 563, 177 N.E.2d 230 (1961). In a bench trial, jeopardy attaches when the court has begun to hear evidence. *Id.* In this case, "convictions" were entered both at the juvenile and criminal level, and it is undisputed that jeopardy attaches after conviction.

Therefore, jeopardy not only attaches during a criminal trial,[9] but also during other non-criminal proceedings, such as military[10] or municipal[11] trials, where serious penalties can be imposed.

This Court has never directly determined whether jeopardy attaches during a juvenile court adjudication of delinquency.[12] But it has found that such a proceeding leads to the imposition of serious restrictions on liberty. In In re *Gault*, 387 U.S. 1 (1967), the Court held that a delinquency adjudication was "comparable in seriousness to a felony prosecution," because the potential disposition, "commitment [to a juvenile institution,] is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'." *Id.* at 36, 50. *See also* In re *Winship*, 397 U.S. 358, 365-366 (1970).

Since *Gault*, almost every court[13] and every legal

[9] *See, e.g.*, United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, *supra.*

[10] *See, e.g.*, Grafton v. United States, *supra.*

[11] *See, e.g.*, Robinson v. Neil, *supra*; Waller v. Florida, *supra.*

[12] In *Gault*, this court noted with disapproval the fact that certain states permitted reprosecution after a child had been adjudicated a delinquent. 387 U.S. at 21-22 n.26.

[13] *See, e.g.*, Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973), *petition for certiorari filed*, 42 U.S.L.W. 3667 (June 4, 1974) (No. 73-1768); Brown v. Cox, *supra*, 481 F.2d at 630 (*dictum*); Lewis v. Howard, 374 F. Supp. 446 (W.D. Va. 1974); United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd on other grounds* 271 F.2d 487 (D.C. Cir. 1959); *In re* Juvenile, ____ Mass. ____, 306 N.E.2d 822, 829 (1974); State v. Marshall, 503 S.W.2d 875 (Tex. Civ. App. 1973); Bryan v. Superior Court, 7 Cal.3d 575, 102 Cal. Rptr. 831, 836, 498 P.2d 1079, 1083 (1972); *In re* Benny G., 24 Cal. App.3d 371, 101 Cal. Rptr. 28

commentator[14] who has addressed the issue has concluded that jeopardy attaches when a delinquency determination is made in a juvenile court. Indeed, the Supreme Court of California, resting its decision on California and federal constitutional requirements, has followed the lead of other courts in this area and has

(1972); Richard M. v. Superior Court, 4 Cal.3d 370 482 P.2d 664, 93 Cal. Rptr. 752 (1971); State v. Halverson, 192 N.W.2d 765 (Iowa 1971) (*dictum*); *In re* P.L.V., 176 Colo. 342, 490 P.2d 685, 687 (1971), *In re* G.D.K., 30 Colo. App. 54, 491 P.2d 81, 82 (1971); Fonesca v. Judges of Family Court, 59 Misc.2d 492, 299 N.Y.S.2d 493 (1969); Tolliver v. Judges of Family Court, 59 Misc.2d 104, 298 N.Y.S.2d 237 (1969); Collins v. State, 429 S.W.2d 650 (Tex. Civ.App. 1968). *Contra*, Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974); Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973), *habeas granted, sub nom.*, Lewis v. Howard, *supra.*; State v. R.E.F., 251 So.2d 672 (Fla. App. 1971) *aff'd, sub nom.*, R.E.F. v. State, 265 So.2d 701 (Fla. 1972), *habeas granted, sub nom.*, Fain v. Duff, 364 F. Supp. 1192 (M.D. Fla. 1972), *aff'd*, 488 F.2d 218 (5th Cir. 1973), *petition for certiorari filed*, 42 U.S.L.W. 3667 (June 4, 1974) (No. 73-1678); *In re* Mack, 22 Ohio App.2d 201, 260 N.E.2d 619 (1970).

[14] *See, e.g.*, Carr, The Effect of the Double Jeopardy Clause on Juvenile Proceedings, 6 U. Tol.L.Rev. 1, 8 (1974) (hereinafter cited as "Carr"); Rudstein, Double Jeopardy in Juvenile Proceedings, 14 Wm. and Mary L. Rev. 266, 279-85 (1972) (hereinafter cited as "Rudstein"); Note, Double Jeopardy and the Waiver of Jursidiction in California's Juvenile Courts, 24 Stan.L.Rev. 874, 880-81 (1972) (hereinafter cited as "Note"); Antieau, Constitutional Rights in Juvenile Court, 46 Cornell L. Q. 387, 395-98 (1961) (hereinafter cited as "Antieau"). *Cf.* Whitebread and Batey, Juvenile Double Jeopardy, (submitted to the Illinois Law Forum for Spring 1975 publication) (hereinafter cited as "Whitebread and Batey").

held that jeopardy attaches to a delinquency hearing. *Richard M. v. Superior Court*, 4 Cal.3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971). Moreover, petitioner conceded this point before the Ninth Circuit,[15] and has not raised an argument to the contrary in this proceeding.[16]

Petitioner's concession is sound. A holding that jeopardy does not attach to a delinquency hearing in the juvenile court would undermine a whole line of decisions related to the instant case which constitute the very underpinning of the juvenile justice system. For example, vitually every court which has had occasion to address the issue,[17] including the Supreme Court of California,[18] has held that a juvenile cannot be reprosecuted in a juvenile court on charges for which the juvenile has been acquitted or convicted in that court. Basic to these holdings is an initial determination that jeopardy attaches at juvenile court delinquency

[15]497 F.2d at 1166.

[16]At several places in his brief, petitioner frames the issue at hand in a manner which suggests that he is arguing that jeopardy did not attach in the juvenile court below. *See, e.g.*, Petitioner's Brief at 12. But nowhere in the brief does petitioner ever conclude that jeopardy did not attach at respondent's delinquency proceeding.

[17]State v. Marshall, *supra; In re* P.L.V., *supra; In re* G.D.K., *supra*; State v. Halverson, *supra*; Fonesca v. Judges of the Family Court, *supra*; Tolliver v. Judges of the Family Court, *supra*; Collins v. State, *supra*. *Cf.* Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968); Sawyer v. Hauck, 245 F. Supp. 55 (W.D. Tex. 1965); Garza v. State, 369 S.W.2d 36 (Tex. Cr. App. 1963).

[18]Richard M. v. Superior Court, *supra*, note 13; *In re* Benny G., *supra*, note 13.

proceedings.[19] The cases then go on to find that juveniles are entitled to the protections of the double jeopardy clause in juvenile courts.

If this Court finds that jeopardy does not attach during juvenile delinquency hearings, it will not only have precluded the use of the double jeopardy right by defendants such as respondent in the instant case, who are transferred from the juvenile system to criminal courts, but it will also have precluded a later consideration of whether the important protection of double jeopardy applies in the juvenile courts. Of course, if this Court finds that jeopardy does attach, it will be free at a later time to decide whether juveniles may, in fact, assert the double jeopardy right in juvenile courts.[20]

Lower courts have also held, although not uniformly,[21] that in states where a prosecutor can

[19]Many of the decisions cited above do not make specific findings that jeopardy initially attached at the first juvenile hearing. However, such a finding is implicit since the courts found that the double jeopardy doctrine applies to juvenile proceedings and they barred retrial after acquittal or conviction.

[20]At that juncture, this Court will not simply determine whether a loss of liberty is at stake during a delinquency hearing. Instead, it will apply the balancing test formulated in *In re* Gault, *supra*, *In re* Winship, 397 U.S. 358 (1970), and McKeiver v. Pennsylvania, *supra*, to determine whether juveniles are entitled to assert the right of double jeopardy in juvenile courts. For a description of the *Gault-Winship-McKeiver* balancing test, *see* Part II *infra*.

[21]*See, e.g.*, Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973), *habeas granted, sub nom.*, Lewis v. Howard, 374 F. Supp. 446 (W.D. Va. 1974).

unilaterally waive juvenile court jurisdiction by filing an information or obtaining an indictment in a criminal court, double jeopardy bars retrial in the latter court if a delinquency hearing has commenced at the juvenile level. *See, e.g., Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), *petition for certiorari filed*, 42 U.S.L.W. 3667 (June 4, 1974) (No. 73-1768); *Lewis v. Howard*, 374 F. Supp. 446 (W.D. Va. 1974). *Cf. Hultin v. Beto*, 396 F.2d 216 (5th Cir. 1968); *Garza v. State*, 369 S.W.2d 36 (Tex. Cr. App. 1963). A fundamental premise in these cases as well is that jeopardy attaches at delinquency hearings in a juvenile court.

If jeopardy is not deemed to attach at a delinquency proceeding, and therefore double jeopardy protections are withheld in both juvenile proceedings and criminal courts, prosecutors unhappy with a juvenile judge's decision will be free to reprosecute a juvenile as often as they wish until they are satified with the disposition. Thus, it will be the prosecutor, and not the juvenile court judge, who will be making the sensitive decisions about the manner in which a child is to be rehabilitated. Prosecutors are not equipped to play such a role. Moreover, the trauma a child would experience if reprosecution were permitted would undercut very seriously the informal and non-adversary atmosphere needed by a juvenile court to accomplish its rehabilitative ends.[22]

Therefore, the Council believes that the overwhelming majority of courts are correct in holding that

[22]For a further discussion about the problems of allowing a prosecutor the right to reprosecute without consent of the juvenile court, *see* Carr, *supra*, 6 U. Tol. L. Rev. at 27-28, 32-34; Rudstein, *supra*, 14 Wm. & Mary L. J. at 280-81.

jeopardy attaches at a juvenile delinquency proceeding, and urges that this Court not reverse decisions which are not now before it by its holding in this case.

C. Double Jeopardy Resulted When Respondent Was Tried in An Adult Criminal Court for The Same Course of Conduct for Which He Was Determined A Delinquent In The Juvenile Court.

1. The "continuing jeopardy" doctrine does not apply to a trial in a criminal court after a delinquency determination has been made in a juvenile court.

Petitioner contends that even though initial jeopardy attached at the juvenile delinquency hearing, and even though respondent is entitled to double jeopardy protections in a criminal trial, jeopardy did not attach a second time at the criminal trial below. Instead, according to petitioner, jeopardy simply continued from the proceedings in the juvenile court. In so arguing, petitioner mistakenly relies upon *Price v. Georgia*, 398 U.S. 323 (1970), where this Court articulated the justification for its repeated holding[23] that a retrial after a reversal upon a defendant's appeal does not violate double jeopardy principles. *Price* held that the jeopardy that attached at the retrial was a "cont-

[23]*See, e.g.*, United States v. Ewell, 383 U.S. 116, 121 (1966); United States v. Tateo, 377 U.S. 463, 466 (1964); Green v. United States, 355 U.S. 184, 197 (1957); Bryan v. United States, 338 U.S. 552 (1950); United States v. Ball, 163 U.S. 662 (1896).

inuation" of the original jeopardy which had attached at the first proceeding.[24]

As the petitioner concedes,[25] this "continuing jeopardy" principle has never been applied to a trial which did not result from the defendant's own appeal. In fact, this Court has expressly refused to extend the doctrine to a retrial resulting from the Government's appeal of a defendant's acquittal. *See, e.g., United States v. Sisson*, 399 U.S. 267, 302-307 (1970); *Kepner v. United States*, 195 U.S. 100 (1904).

In *Price*, this Court implicitly explained why the continuing jeopardy doctrine does not apply to cases such as *Sisson* and *Kepner*. It noted that the "continuing jeopardy" doctrine is premised, *inter alia*, on a theory of "limited waiver": *i.e.*, a defendant "waives" his right to double jeopardy by pursuing an appeal of his conviction. 398 U.S. at 329 n. 4.[26] Of

[24]Every court which has held that a trial in criminal court after a post-delinquency transfer does not violate the double jeopardy protection has relied solely upon the "continuing jeopardy" doctrine as articulated in *Price*. *See, e.g., In re* Juvenile, *supra*; Bryan v. Superior Court, 7 Cal.3d 575, 583, 102 Cal. Rptr. 831, 836, 498 P.2d 1079, 1084 (1972); *In re* Gary Steven J., 17 Cal. App.3d 704, 710, 95 Cal. Rptr. 185 (1972). While the District Court decision below held that jeopardy did not attach at the juvenile court because it was a "civil" proceeding, its primary argument related to the continuing jeopardy principle. Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972), *rev'd*, 497 F.2d 1160 (9th Cir. 1974).

[25]Petitioner's Brief at 29-30.

[26]Retrial after a successful appeal was originally justified on a "waiver" theory. *See, e.g.*, Kepner v. United States, *supra*, 195 U.S. at 131. However, in Green v. United States, *supra*, 355 U.S. at 19, this theory was rejected. In *Price*, however, the theory was once again adopted by this Court.

course, there was no "waiver" in the instant case, because respondent did not ask to be transferred to the adult court. Indeed, it was the State, through the auspices of the juvenile court judge, which sought the transfer. Therefore, this case is analogous to a government appeal after an acquittal, where double jeopardy does apply.

Moreover, a critical restriction associated with the continuing jeopardy doctrine is not applicable to a transfer to a criminal court after an adjudication of delinquency in a juvenile court. *Price* specifically held that at a retrial after a reversal a defendant could not be charged with a more serious offense than that for which he was convicted at the first trial. *Id.* at 326-330. But after transfer, unlike a reversal after an appeal, prosecutors must file a new indictment or information to commence the adult criminal proceeding, and, at that time, they are free to allege the violation of a more serious offense than was initially charged in the juvenile court. They may be especially likely to do so if the delinquency hearing revealed that the youth had committed a more serious offense than was previously known.

Finally, the strong policy for allowing retrial after an appeal does not apply in the instant case. The drafters of the double jeopardy clause contemplated that a new trial would be permitted after a reversal on appeal to avoid a hazard to the public by freeing the guilty. 1 *Annals of Congress* 753 (June 8, 1789). The First Congress directed that the initial version[27] of the clause

[27]Madison's version of the clause as initially introduced read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." 1 *Annals of Congress* 434 (June 8, 1789).

be redrafted because its original language could be construed to permit a defendant to go free after a successful appeal. *Id.*

However, no such hazard exists in this case. The respondent would not have gone free if retrial had been barred below. He would have been incarcerated in a correctional institution until he reached majority. The inapplicability of the underlying policy of *Price* to the present situation is a further reason for holding that the double jeopardy protection should have been applied to respondent's criminal trial below.

2. The policies of the double jeopardy clause are served by prohibiting the reprosecution of respondent.

Petitioner attempts to bolster his unique extension of the "continuing jeopardy" theory by arguing that no "policy" of the double jeopardy clause is served if the reprosecution of a juvenile is barred in an adult court. According to petitioner, the basic policy of double jeopardy is to prevent multiple punishments. Therefore, petitioner argues, the protection applies only if the defendant has been previously sentenced and not if, as in the respondent's case, he has merely been convicted. Petitioner's Brief at 24-27.

However, in so arguing, petitioner has ignored the fact that "the Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, *not punishment*." *Price v. Georgia, supra*, 398 U.S. at 329 (Burger, C.J.) (emphasis added). As Mr. Justice Harlan said in *United States v. Jorn, supra*, 400 U.S. at 479:

> "The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the *heavy personal strain which a criminal trial represents* for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." (Emphasis added.)[28]

While the policy of preventing multiple punishments may not apply in the instant case, the policy of preventing "heavy personal strain" is certainly relevant. Few defendants experience greater trauma than a juvenile forced to run the gauntlet of procedures in two separate court systems. The decision below, by preventing needless retrials, represents an application of this Court's traditional sensitivity to constitutional deprivations experienced by youthful defendants, and its recognition that those of tender years are more easily scarred by such deprivations. *See, e.g., Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

Finally, petitioner's contention that the double jeopardy clause was designed to protect only those individuals who are twice punished, implies that initial jeopardy does not *attach* until a defendant has been sentenced – a postulate which is directly contrary to the general rule that jeopardy attaches when the fact

[28] *See also*, Benton v. Maryland, *supra*; Green v. United States, *supra*, 355 U.S. at 187; *Ex parte* Lange, 18 Wall. 163 (1873); Note, Twice in Jeopardy, 75 Yale L.J. 262, 267 (1965).

finder begins to hear evidence. See, *e.g., United States v. Jorn, supra; Downum v. United States, supra.* Indeed, it has often been held that a second prosecution is barred even though the initial trial was never completed. *Id.*

In short, the constitutional history, case law, and policies behind the continuing jeopardy doctrine clearly indicate that it has no application to the situation before this Court. The doctrine is a narrow one. This Court has expressly held it cannot be extended to circumstances analogous to respondent's case.

II.

THE DETERMINATION OF WHETHER A DEFENDANT IS ENTITLED TO DOUBLE JEOPARDY PROTECTION IN A STATE CRIMINAL COURT SHOULD NOT BE BASED ON A CONSIDERATION OF POSSIBLE INDIRECT CONSEQUENCES A STATE MIGHT SUFFER FROM THE GRANT OF SUCH A RIGHT.

Petitioner asserts that if this Court does not find that the "continuing jeopardy" principle applies in the instant case, the otherwise automatic double jeopardy protection should then be withheld from respondent because of "the *possibility* that [such protection] may have a collateral, yet significant effect on the future operations of the juvenile court." Petitioner's Brief at 20-21 (emphasis added).

The potential disruption which petitioner advances as sufficient justification to bar the application of double

jeopardy is that a state juvenile court, wishing to transfer a juvenile to a criminal court, would be compelled to decide the transfer issue prior to a delinquency proceeding. *Id.* at 36. As petitioner correctly concludes, only by using the prior transfer can the resulting criminal trial be consistent with the mandates of double jeopardy clause. No jeopardy attaches at the juvenile proceeding in this instance, because resolution of the transfer issue alone does not lead to any permanent restrictions upon the accused's liberty. *See, e.g., Brown v. Cox*, 481 F.2d 622 (4th Cir. 1973); *People v. Wilson*, 7 Ill. App. 3d 158, 287 N.E.2d 211 (1972). *Cf. Collins v. Loisel*, 262 U.S. 426 (1923); *Bassing v. Cody*, 208 U.S. 386, 391-92 (1908).

It is the position of the *amicus* that if an individual asserts an established right in a forum to which the right has already been constitutionally extended by this Court, possible adverse consequences experienced by a state are irrelevant. A state's interests are considered only when the fundamental right asserted has never before been recognized,[29] or when the boundaries of a recognized right have never been fully defined.[30] The

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[29] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618, 634, 643 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

[30] *See, e.g.*, CSC v. Letter Carriers, 413 U.S. 548 (1973); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Epperson v. Arkansas, 393 U.S. 97 (1968). It should be noted that *Gault, Winship*, and *McKeiver* also fit into this latter caregory. In each of these cases the rights to be asserted had long been recognized, but never extended to a juvenile court.

fundamental right at stake in the instant case, double jeopardy protection, has certainly long been recognized. Moreover, this Court has clearly held that the boundaries of double jeopardy protection extend to defendants in state criminal courts after jeopardy has attached in a non-criminal proceeding where loss of liberty is at stake. *See, e.g., Robinson v. Neil, supra; Waller v. Florida, supra.*

Petitioner's argument that the assertion of the double jeopardy right in a state criminal court can be defeated if the collateral consequences of that right might disrupt juvenile processes applies a balancing test similar to that articulated by this Court in *Gault, Winship*, and *McKeiver* – "whether the application of the right is necessary to the achievement of 'fundamental fairness' and whether it will disrupt the juvenile court system." *Brown v. Cox, supra*, 481 F.2d at 630. However, as petitioner notes,[31] *Gault, Winship* and *McKeiver* are concerned only with whether certain federal constitutional rights should be extended through the Fourteenth Amendment's due process clause to the juvenile court system. That issue is not present here.

The respondent does not ask that any right be applied in a juvenile court. He does not assert either a right to be free from double jeopardy in a juvenile court or a right to a transfer hearing prior to a determination of delinquency. He has asserted his right to be free from reprosecution in an adult court.

The only connection this case has with a juvenile court is that it involves the question of whether jeopardy attached at respondent's delinquency pro-

[31] Petitioner's Brief at 16-17.

ceeding. That question does not deal with the application of a *right* to the juvenile court system, for a mere attachment of jeopardy does not in and of itself provide any protection to a juvenile. Courts have recognized this fact, and as described above,[32] have used a test far different from that developed in *Gault, Winship*, and *McKeiver* to determine whether jeopardy attaches to non-criminal proceedings. It is a simple inquiry into whether the tribunal can impose serious restrictions on liberty. It requires no balancing.

If this Court should nevertheless find that it must consider the collateral consequences of an affirmance, and balance them against the right asserted in this matter, the state must meet a more strict standard than that set out in *Gault, Winship*, and *McKeiver*. Those cases heavily weigh the balancing process in the state's favor, because the right in question is to be asserted within a juvenile court, which is a rehabilitative, rather than a punitive, tribunal. In the instant case, since respondent is not asserting his right to double jeopardy protection in a *parens patriae* context, the state, to prevail, must demonstrate at a minimum that it has a compelling interest to abridge respondent's double jeopardy claim.[33]

[32] *See* Part I(B) *supra.*

[33] Whenever the assertion of a fundamental right is at stake, a state must show a compelling interest before it may abridge that right. *See, e.g.,* Roe v. Wade, supra, 410 U.S. at 153-55; Dunn v. Blumstein, 405 U.S. 330, 335-37 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634, 643 (1969); Griswold v. Connecticut, supra, 381 U.S. at 485. It should be noted, however, that these cases all dealt with rights which either had not previously been recognized or

However, regardless of which balancing test is used, this Court should find that the double jeopardy right applies in the instant case. Not only has California no compelling interest in abridging respondent's fundamental double jeopardy right by the use of transfer after a delinquency proceeding, but as discussed below, even under the more lenient standards contained in *Gault*, *Winship*, and *McKeiver*, respondent's double jeopardy rights are paramount, for the use of "prior transfer" will actually strengthen the benevolent purposes of the juvenile justice system. Moreover, the use of prior transfer is necessary to the achievement of fundamental fairness in juvenile courts.

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whose boundaries had not clearly been defined. As we have mentioned above, petitioner is asserting an established and well defined right, and therefore, no balancing need occur before the right can be successfully asserted.

III.

THE CONDUCT OF THE TRANSFER HEARING PRIOR TO A DETERMINATION OF DELINQUENCY WILL NOT DISRUPT THE BENEVOLENT ASPECTS OF THE STATE'S JUVENILE COURT SYSTEM AND IS REQUIRED FOR FUNDAMENTAL FAIRNESS.

A. Requiring A Transfer Proceeding to Be Conducted Prior to An Adjudication of Delinquency Will Not Disrupt the Benevolent Aspects of The Juvenile Court System.

1. Most jurisdictions preclude the use of transfer after a delinquency determination has been made.

One of the most telling indications that a prior transfer requirement will have no disruptive effect upon the positive aspects of the juvenile court system is that this procedure is already in use in most jurisdictions in this country. The statutes, rules, or decisions of twenty-three states,[34] the District of Columbia[35] and the federal government[36] explicitly require that transfer be decided prior to a determination of delinquency, thereby precluding the use of transfer after a delinquency determination has been made. Five states do not allow a juvenile to be transferred to a criminal court, hence transfer after a delinquency determination is *a fortiori* precluded.[37]

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[34] *See* Appendix hereto, column 1, *infra*, for a listing of the states and the relevant statute, rule, or decision.

[35] *Id.*

[36] *Id.*

[37] *See* Appendix, column 2, *infra*.

Five other states,[38] which have not clearly resolved the issue by statute, rule, or decision, require the use of prior transfer as a practical matter. The statutes of these states provide that juveniles may be transferred without any demonstration that they committed the crimes with which they have been charged.[39] The fact that no criminal proof is needed to achieve transfer[40] is a strong indication that the state legislatures in question did not contemplate a full-scale hearing on criminality prior to transfer.[41] These states' statutes also provide that no evidence used against a juvenile in a juvenile court can be introduced in an adult court.[42] Therefore, if juveniles are tried on the delinquency issue in a juvenile court before transfer, prosecutors cannot use any of the evidence produced at a delinquency hearing in a criminal court. Hence, the statutory framework in these five states is such that the use of transfer after an adjudication of delinquency is strongly discouraged.

The statutes of twelve other jurisdictions[43] give no

[38]Hawaii, Indiana, New Jersey, Rhode Island, and Utah.

[39]*See* Appendix, column 3, *infra.*

[40]It has been argued that as a constitutional matter a juvenile cannot be transferred without a minimal showing of probable cause that he committed the crime with which he is charged. *See, e.g.*, Carr, *supra*, 6 U. Tol. L. Rev. at 25-26. Even if this is so, we can still infer from a legislature's failure to require any criminal showing that the legislature did not intend a hearing on the delinquency issue prior to transfer.

[41]If transfer is conducted after a delinquency determination has been made, the State will have had to prove at the delinquency hearing that the juvenile is "delinquent" beyond a reasonable doubt. *In re* Winship, *supra* note 20.

[42]*See* Appendix, column 3, *infra.*

[43]*Id.* at column 4.

clear indication of the stage of the juvenile process at which transfer should take place, and therefore it could be argued that they permit transfer after a conviction in a juvenile court. However, it is doubtful that as a practical matter transfer after a delinquency determination is prevalent, since there are no reported decisions arising from these states about this critical issue. Moreover, one of the twelve states, Connecticut, allows a transfer only when the juvenile has been charged with murder, thereby indicating that transfers after a delinquency proceeding are infrequent.[44]

In three states,[45] including California, a rule or decision permits transfer to take place after a delinquency proceeding has been completed. However, the fact that the California Supreme Court[46] and the California College of Trial Judges[47] have both concluded that prior transfer is preferable casts doubt on whether the practice of transfer after a delinquency determination is widespread even in these jurisdictions. In *Donald L. v. Superior Court*, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850 498 P.2d 1098, 1101 (1972), the California Supreme Court took note that the "usual" practice was for the juvenile courts to decide the transfer issue prior to any determination of delinquency.

[44]*Id.*

[45]*Id.* at column 5.

[46]Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal. Rptr. 850, 498 P.2d 1098, 1101 (1972).

[47]California Juvenile Court Deskbook, § 10.4 at 148-50 (California College of Trial Judges) (1972).

Finally, only two states[48] require that transfer be determined after an adjudication of delinquency. It should also be noted that Massachusetts, which requires transfer after a delinquency determination, and Ohio, which permits the use of this latter procedure, have strict exclusionary rules precluding the use of any evidence introduced in the delinquency proceeding in any other forum.[49] As mentioned above, such a restriction makes a criminal trial almost an impossibility after there has been a delinquency hearing in the juvenile court.

In sum, thirty-three states, the District of Columbia, and the federal government either specifically, or as a practical matter, preclude the use of transfer after an adjudication of delinquency. Only two states require that transfer be held after a delinquency determination, and between three and fifteen permit the practice.

2. Most model juvenile court acts and other authorities preclude or discourage the use of transfer after a delinquency determination.

Contrary to petitioner's assertions,[50] virtually every model juvenile court act prohibits the use of transfer after a delinquency adjudication. For example, section 34 of the *Uniform Juvenile Court Act*[51] specifically

[48]*See* Appendix, column 6, *infra.*

[49]Mass. Ann. Laws, Ch. 119, § 60 (Cum. Supp. 1972); Ohio Rev. Code Ann. § 2151.358 (1971).

[50]Petitioner's Brief at 49-50.

[51]Uniform Juvenile Court Act, 9 Uniform Laws Ann. 429 (Master ed. 1973).

requires that transfer be conducted prior to the delinquency determination. And, while the *Standard Juvenile Court Act,*[52] published by *amicus* and the National Council on Crime and Delinquency in 1959 does not clearly indicate when a transfer hearing should be held, the latter organization wrote the *Model Rules for Juvenile Courts*[53] in 1969, which emphatically mandate that transfer be decided "before the commencement of the adjudicatory hearings."[54] As evidenced by this brief, *amicus* agrees with this requirement. Moreover, section 31(a) of the *Legislative Guide for Drafting Family and Juvenile Court Acts,*[55] which petitioner describes as "not expressly encompass[ing] the transfer situation and thus [not able to] be read as taking a definite position against transfer as a dispositional alternative,"[56] also explicitly requires that the transfer hearing be held prior to a hearing on the merits of a delinquency petition.

In addition, the Juvenile Justice Standards Project, an advisory panel of juvenile court experts assembled and sponsored by the American Bar Association and the Institute for Judicial Administration, has recently approved, on a tentative basis, a standard which requires that the transfer hearing be held prior to an

[52]Standard Juvenile Court Act § 13 (6th Ed. 1959).

[53]Model Rules for Juvenile Courts (National Council on Crime and Delinquency 1969).

[54]*Id.* at Rule 9.

[55]Sheridan, Legislative Guide for Family Drafting and Juvenile Court Acts § 31(a) (Children's Bureau, Department of Health, Education & Welfare 1969).

[56]Petitioner's Brief at 49.

adjudication of delinquency.[57] Indeed, almost every legal commentator[58] who has addressed this issue has concluded, as a matter of constitutional law and of practicality, that it is preferable to conduct the transfer hearing prior to a delinquency determination.

Finally, even those courts[59] which have held that transfer after a delinquency hearing does not violate the double jeopardy clause have not done so on the ground that such a transfer proceeding is more practical than transfers conducted at the outset of the juvenile

[57]The American Bar Association and Institute for Judicial Administration Juvenile Justice Standards Project, Standards on Waiver of Juvenile Court Jurisdiction, §2.1(e) (Tentative Draft December, 1974). While this draft must be approved by the ABA's House of Delegates before it becomes final, approval by the Project itself constitutes an important endorsement of prior transfer.

[58]Whitebread and Batey, *supra* note 14; Rudstein, *supra* note 14; Note, *supra* note 14; Antieau, *supra* note 14. *Contra*, Carr, *supra* note 14. It should be emphasized that the only situation in which Professor Carr argues that the double jeopardy protection should not apply is when a transfer hearing is conducted after the delinquency proceeding. In all other situations, including when the youth is transferred after a dispositional order has been entered (*e.g.*, when the youth has been found delinquent and has been incarcerated in a correctional institution), Professor Carr believes the double jeopardy protection should apply.

[59]*See, e.g.*, Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972) *rev'd*, 497 F.2d 1160 (9th Cir. 1974); *In re* Juvenile ____ Mass. ____, 306 N.E.2d 822, 828-30 (1974); Bryan v. Superior Court, 7 Cal.3d 575, 580-83, 102 Cal. Rptr. 831, 834-36, 498 P.2d 1079, 1082-85 (1972); *In re* Gary Steven J., *supra*, 17 Cal. App.3d, at 709-10, 95 Cal. Rptr. at 189-90 (1971); Carter v. Murphy, 476 N.W.2d 28, 31-32 (Mo. Ct. App. 1971); *In re* Mack, 22 Ohio App.2d 201, 204, 260 N.E.2d 619, 621 (1970).

process. Instead, these courts appear to have rested their decisions on legal doctrines pertinent to the double jeopardy protection, and not out of a concern for the practical workings of the juvenile court.[60]

3. As a practical matter, a prior transfer is the preferable procedure.

This Court's concern about the benevolent aspects of the juvenile court system has always focused upon insuring that the delinquency determination is informal,[61] non-adversarial,[62] confidential,[63] and free from any stigma of criminality.[64] The conduct of a transfer hearing prior to the delinquency hearing should further, rather than detract, from these objectives. If juveniles are secure in the knowledge that they will not

[60]Almost all of the courts listed in n.59, *supra*, have rested their decision on the "continuing jeopardy" principle. *In re* Mack, rested its decision on the ground that jeopardy does not attach at a juvenile court proceeding. The district court below only partially based its decision on this latter ground.

[61]*See, e.g.*, McKeiver v. Pennsylvania, *supra*, 403 U.S. at 534; *In re* Winship, *supra*, 397 U.S. at 366-67; *In re* Gault, *supra*, 387 U.S. at 25-27.

[62]*See, e.g.*, McKeiver v. Pennsylvania, *supra*, 403 U.S. at 550; 575; *In re* Winship, *supra*, 397 U.S. at 375.

[63]*See, e.g.*, McKeiver v. Pennsylvania, *supra*, 403 U.S. at 550; *In re* Winship, 397 U.S. at 366-67; *In re* Gault, *supra*, 387 U.S. at 24-25.

[64]*See, e.g., In re* Winship, *supra*, 397 U.S. at 366; *In re* Gault, *supra*, 387 U.S. at 23-24.

be transferred to an adult court during or after their delinquency hearing, common, though often unrealistic, fears that they will offend juvenile authorities with recitations of their behavior and background will be somewhat alleviated. They will not have to worry that they may suddenly be transferred to a criminal court because of a candid admission. Cooperation between the juvenile and the court's officers will be increased, and the adversary nature of the delinquency and dispositional phases of the juvenile process will be reduced. Moreover, prior transfer will in no way affect the confidentiality of the juvenile process, nor will it add any stigma of criminality to the system.

The Council also believes, and will indicate below that the specific practical problems raised concerning the use of prior transfer are not of controlling significance.

a. Prior transfer will not "engraft" a new procedure to, or cause undue delay in, the juvenile system.

Petitioner asserts that requiring transfer to be conducted at the outset of a juvenile proceeding will add a "cumbersome" procedure to the California juvenile court system. According to petitioner, instead of merely holding a hearing on delinquency and conducting a dispositional process at which time the juvenile can be transferred, the Court will be required to hold a third hearing–dealing solely with the transfer issue–prior to the trial on delinquency. Petitioner's Brief at 36-45.

However, even the former presiding Judge of the Los Angeles Juvenile Court, Marvin A. Freeman, in denying

respondent's petition for a writ of habeas corpus, recognized that the use of prior transfer would not result in a new and cumbersome proceeding. In this regard, he said:

> "I don't disagree, counsel, as to what would be the *better procedure* is that at the detention hearing,[65] [which is held prior to the determination delinquency] the decision be made as to whether there should be a fitness hearing. At the detention hearing it is clear that the police report may be considered, anything probation introduces may be considered.[66] There is no requirement that evidence be limited to competent evidence, and in the usual case it should be at the detention hearing.
>
> I will go further and say I don't think that the Juvenile Court would be crippled if there were no 707 as it is now constituted, that is, *I don't know*

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[65]California, as is true in most states, requires that a detention hearing be held one judicial day after a delinquency petition is filed in juvenile court. The purpose of the hearing is to determine whether the minor should be released pending further hearings. Cal. Welf. and Inst'ns Code §§632, 635, 636 (1972). *See In re* William M., 3 Cal.3d 16, 89 Cal. Rptr. 33 (1970). *See also* Levin & Sarri, Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States (National Assessment of Juvenile Corrections) (1974) at 26-27, for a listing of the 36 states which provide a similar screening apparatus.

[66]One commentator has noted: "[T]he facts underlying several juvenile court cases indicate that the probation report is often prepared and given to the judge prior to the [delinquency] hearing. Consequently, it is simply a matter of time spent waiting for the report to be considered by the judge, not a matter of time spent in preparation." Note, *supra*, 24 Stan.L.Rev. at 897.

our operation would really be hampered if the rule were laid down that at the arraignment or detention hearing or in any event before the introduction of evidence at the adjudication the court may set the matter for a [transfer] hearing." Joint Appendix at 43 (emphasis added).

The recognition that prior transfer is preferred to transfer after a delinquency determination by the California Supreme Court,[67] by the California College of Trial Judges,[68] and by Judge Freeman, indicates that many California juvenile courts are using the prior transfer at present, and that petitioner's vision of a third, cumbersome hearing is unwarranted.

In addition, a prior hearing does not have to be held in every case. In many situations, a judge can determine without a hearing that a child should not be

[67] Donald L. v. Superior Court, *supra* note 46.

[68] California Juvenile Court Deskbook, *supra*, § 10.4 at 148-50.

transferred. For example, if the child is young, and has committed a first minor offense, most courts immediately recognize that no transfer hearing is needed.[69]

Finally, even when the juvenile court considers transfer after a hearing on delinquency, it must hold a separate transfer hearing. If the child proves he is amenable to rehabilitation, the juvenile judge would then consider other dispositional alternatives. Hence, in such a situation, as when prior transfer is required, there is a possibility that three hearings—relating to delinquency, transfer, and disposition—will be held. In fact, by requiring an early decision on transfer, the juvenile court may eliminate, rather than add, procedures. If the juvenile is transferred, there will be no need for a delinquency or dispositional hearing.

b. The need for judges who rule on transfer to recuse themselves from the delinquency proceeding is negligible.

Petitioner also contends that since many of the issues considered at a transfer hearing are potentially prejudicial to a consideration of the juvenile's guilt[70] juvenile court judges using prior transfer will be

[69] On the other hand, certain juveniles, because of their recidivism may clearly be candidates for transfer. *See, e.g.*, Note, *supra*, 24 Stan.L.Rev. at 898-99. In these situations as well, a transfer hearing should not be a time consuming process.

[70] The juvenile court judge's consideration of the juvenile's character and background at the transfer hearing might taint his decision on the issue of whether the juvenile has committed the crime with which he is charged.

compelled to recuse themselves from the delinquency hearing. A few jurisdictions do require the reassignment of a judge after he has chosen not to transfer the juvenile.[71] However, these jurisdictions also permit the juvenile, or an interested party, to waive the transfer judge's dismissal.[72]

The reason for this waiver provision is clear. A juvenile will ordinarily not want to dismiss a judge who has refused to transfer him to a criminal court. There is a risk of having another judge assigned to the case who is not as sympathetic. Moreover, in many cases, a rapport has been established between the judge and the juvenile, and the goal of rehabilitation is well on its way to being met. In practice, then, the dismissal of a judge in this instance would be rare. And, of course, recusal would not even be an issue where the judge had transferred the child to a criminal court or where the judge did not conduct a hearing due to the child's obvious amenability to rehabilitation.

But even in situations where recusal does take place, the supply of judges in large urban jurisdictions would negate the problem. And, smaller jurisdictions do not have the volume of juvenile case work that would cause the recusal situation to arise frequently. Moreover, even if the problem were to occur, it is not unusual for

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[71] Fla. Stat. Ann. § 39.09(2)(g) (1974); Tenn. Code Ann. § 37-234(3) (Supp. 1973); Wyo. Stat. § 14-115.38(c) (Supp. 1973). *See also*, Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal. Rptr. 850, 853, 498 P.2d 1098, 1101 (1972); Uniform Juvenile Court Act, *supra*, note 51, § 34(E).

[72] *Id.*

judges in sparsely populated localities to cross jurisdictional lines in order to avoid a local judge's potential conflict of interest.

c. The bifurcation process will not be disrupted by a prior transfer proceeding.

Petitioner contends that a prior transfer requirement would disrupt California's commitment to a bifurcated juvenile hearing,[73] where the delinquency issue is heard separately from the dispositional determination. The juvenile judge, according to petitioner, would make dispositional judgments relating to the child's background and social behavior at the transfer hearing, which could be prejudicial if the issue of guilt must be decided.

Of course, the California Supreme Court, which supports bifurcation,[74] has also indicated a preference for prior transfer, thereby suggesting that in its view the two are compatible.[75] Moreover, the California statutory provision[76] which provides for transfer contemplates that issues relating to transfer could be considered with the delinquency determination since the trial judge is given the authority to enter a transfer order at any time during the delinquency hearing.

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[73] *In re* Gladys R., 1 Cal.3d 855, 589-60, 83 Cal. Rptr. 671, 674-75, 464 P.2d 127, 130-31 (1970).

[74] *Id.*

[75] Donald L. v. Superior Court, *supra* note 46.

[76] Cal. Welf. and Inst'ns. Code § § 707 (1972).

Finally, this entire issue is easily resolved by a requirement that juvenile court judges, having passed upon transfer, must recuse themselves from the delinquency determination, unless the child waives his right to the judge's dismissal. With this resolution, the juvenile can either opt for complete bifurcation–*i.e.*, a new judge who would determine delinquency and then, if necessary, consider disposition–or allow the transfer judge with whom the child may have established a rapport to hear the issue of delinquency.

d. The juvenile court has sufficient resources to gather all relevant information about a juvenile at a prior transfer hearing.

In its petition for certiorari, petitioner complained that requiring a prior transfer would prevent the State from "removing disruptive or depraved individuals from its programs, [thereby ending] a promising experiment." Petition for Certiorari at 17. By this argument, petitioner has implied that the State does not have adequate resources at its disposal to make an informed judgment about the character of a juvenile prior to a hearing on delinquency, an implication that has no basis in fact. As one state supreme court has said:

> "[I]f a county attorney is causing juvenile cases to be investigated properly . . . he will know in advance whether he desires to prosecute criminally and he can so move the court at or before the outset of the hearing. He has available the investigative facilities of the probation officer, the law enforcement officers, and the social services staff. . . ." State v. Halverson, 192 N.W.2d 765, 769 (Iowa 1971).

Moreover, petitioner himself has said that California juvenile correctional institutions are capable of handling the worst kind of disciplinary problems.[77] But even if this were not the case, this *amicus* believes that the doctrine of double jeopardy is flexible enough to permit transfer after an adjudication of delinquency where information, which could not have been discovered at an earlier stage, clearly demonstrates that a youth is not amenable to juvenile treatment.[78]

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[77] A commentator, summarizing an interview with petitioner Breed, concluded: "[Petitioner Breed] has suggested that his organization could easily handle [disruptive juveniles who have mistakenly not been transferred] and has concluded that the [California Youth Authority] could abide by a system of irrevocable [transfer] decisions made prior to the attachment of jeopardy with absolutely no alteration in its current attitudes, administration, or effectiveness." Note, *supra*, Stan.L.Rev. at 900.

[78] One major exception to the double jeopardy clause is found in the "manifest necessity" doctrine: that is, a second trial is allowed when an unforeseen intervening force causes the disruption of the initial trial. *See, e.g.*, Downum v. United States, *supra*, note 8; Gori v. United States, 364 U.S. 367 (1961); Wade v. Hunter, 336 U.S. 684 (1949); Thompson v. United States, 155 U.S. 271 (1894). The doctrine has been limited to mistrials. However, it could be argued that if a child withheld important evidence from the court or juvenile authorities and such evidence clearly indicated that the youth ought to be tried as an adult, then the juvenile court might be able to transfer the juvenile to a criminal court. Also, if a child not transferred proved to be unpredictably and seriously disruptive after disposition, the juvenile court might be free, after making suitable findings, to transfer the youth to a criminal court on the ground of "manifest necessity." Indeed, such a ruling is compatible with state statutes which permit a youth correctional authority to return a child to the juvenile court if the child is incorrigible. Cal. Welf. and Instn's. Code § § 707, 780, 1731.1 (1972).

e. Prior transfer will not lead to unfair plea bargaining.

One commentator[81] has suggested that requiring the transfer decision to be made before a determination of delinquency will cause an unwarranted increase in a prosecutor's plea bargaining power. According to the argument, if a state has a weak case against a juvenile with a bad prior record, the prosecutor, knowing that he will not have to prove delinquency beyond a reasonable doubt to achieve transfer,[80] will be tempted to coerce the child into pleading guilty by threatening to seek transfer to a criminal court. The arument continues that a juvenile to whom such a bargain is extended, uncertain of the case against him and frightened by the prospect of a trial in a criminal court, will be especially vulnerable to the prosecutor's offer.

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[79] Carr, *supra*, 6 U. Tol. L. Rev. at 49-51.

[80] If the transfer hearing is held prior to a hearing on delinquency, the prosecutor, in some states, does not have to present any evidence demonstrating that the juvenile committed the offense with which he is charged. *See* Appendix, column 3, *infra*. *Cf.* n.40 *supra*. However, in some states the prosecutor must show that there is probable cause that the juvenile committed the act with which he is charged. *See, e.g.*, Colo. Rev. Stat. Ann. §§ 22-3-6(4)(a)-(c)-8(1) (Supp. 1969). A great many jurisdictions merely require that the seriousness of the offense be considered in transfer. *See, e.g.*, Okla. Stat. Ann. tit. 10, § 1112(b) (Supp. 1974). However, in all jurisdictions that permit transfer the fundamental question is whether the child can be rehabilitated in the treatment facilities available to the juvenile court. *See, e.g.*, The President's Commission on Law Enforcement and Administration of Criminal Justice, Task Force Report: Juvenile Delinquency and Youth Crime, Appendix B, Table 5, at 78 (1967).

It is the view of this *amicus*, however, that this hypothetical tactic would be unethical,[81] if not illegal.[82] Moreover, the opportunities for questionable plea bargaining may be worse if transfer is not decided until after a hearing on delinquency. At that time, a prosecutor will have been exposed to the juvenile's case. Absent a strict exclusionary rule, the chances of reconviction in a criminal court will be strong. In this circumstance, prosecutors will be in an excellent bargaining position to obtain a guilty plea to a lesser-included adult offense. And, since there would clearly be sufficient evidence to convict after a delinquency proceeding, such bargaining may not be illegal.

B. Allowing the Transfer Hearings To Be Held after An Adjudication of Delinquency Is Fundamentally Unfair to The Juvenile.

In *Winship* and *McKeiver*, this Court made it clear that the necessity of a procedure in a juvenile court is

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[81] ABA Standards, The Prosecution Function §§ 4.1(c), 4.2 (Approved Draft 1971). A commentary to the former standard concludes:

> "Although the prosecutor is under no obligation to reveal any evidence to defense counsel in the course of plea discussion, truth is required in the presentation of facts relating to the case or any mitigating facts to the defense counsel. The prosecutor's basic duty to seek a just result as well as his obligation to eschew the use of deception in dealing with the evidence also forbid his misrepresenting the law or sentencing practices of the court in plea discussions. . . ." *Id.* at commentary to § 4.1(c).

[82] *See, e.g.*, Monroe v. State Bar, 55 Cal.2d 145, 10 Cal. Rptr. 257, 358 P.2d 529, 533 (1961). *See also*, ABA Standards, The Prosecution Function, *supra*, commentary to § 4.2 (explaining requirement in many jurisdictions that the prosecutor prove a *prima facie* case as a condition to entry of guilty plea).

measured by the "fairness" it brings to the juvenile justice process.[83] As we demonstrate below, the use of transfer after disposition is "fundamentally unfair" to juveniles, and therefore is not needed in that process.

1. Exposure of the juvenile's entire case to the government, which may have the opportunity to retry the juvenile in a criminal court, is fundamentally unfair.

The Council believes that the greatest injustice emanating from the use of transfer after a disposition of delinquency is that if the juvenile is transferred, the Government will have had the benefit of reviewing the juvenile's case prior to the criminal trial. In its decision below, the Ninth Circuit stressed this problem:

> "Nowhere in our criminal system do we allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged. The most heinous and despicable criminal is saved from such an invasion of his fundamental rights. Yet, if we adopt California's position, we approve having such a procedure applied to those of tender years. This offends our concepts of basic even-handed fairness." 497 F.2d at 1168.

Some jurisdictions which allow the use of transfer after a delinquency determination have exclusionary rules which prevent evidence obtained in a juvenile

[83] In *McKeiver*, Mr. Justice Blackmun stated: "[T]he applicable due process standard in juvenile proceedings is fundamental fairness, as developed by [*Gault*] and [*Winship*]." 403 U.S. at 528.

process from being used in an adult court.[84] For example, California, by case law,[85] urges exclusion in a criminal court of testimony given by the defendant in the juvenile system. However, this limited rule still permits the prosecutor to use any evidence that has been obtained on the basis of the juvenile's testimony or to use any other testimony presented with the juvenile's case. *See, e.g., Carr, supra*, 6 U. Tol. L. Rev. at 53. Hence, California's limited exclusionary device does not ameliorate the unfairness a youth may experience in this regard.

2. The use of transfer after an adjudication of a delinquency creates an unfair dilemma for juveniles.

If juveniles must wait until they have been tried on delinquency charges to know whether they will be transferred to a criminal court, after detention they will be faced with the cruel decision of whether it is more likely that they will be transferred if they cooperate with juvenile authorities or if they remain silent. Some juveniles, confronting this unfair choice, may tend to be unduly reticent because of a belief that some aspect of their behavior or background will be sufficiently offensive to require transfer to an adult court. Indeed,

[84] For a complete listing of states which provide various types of exclusionary protection to the juvenile, *see* Carr, *supra*, 6 U. Tol. L. Rev. at 53 and nn. 298-99; Rudstein, *supra*, 14 Wm. and Mary L. Rev. at 293 and nn. 118 & 119.

[85] Bryan v. Superior Court, 7 Cal.3d 575, 587, 102 Cal. Rptr. 831, 839, 498 P.2d 1079, 1087 (1972).

their belief may be unrealistic, because juveniles in some instances are more critical of their own past behavior than are seasoned juvenile authorities. On the other hand, juveniles may also be unduly coerced into saying more than they would wish out of fear that undue reticence, a possible indication of unrepentance, will lead to transfer. In this instance, their right to be free from self-incrimination may be jeopardized because of the pressures the system places upon them. The Supreme Court of California recognized the severity of this dilemma when it said:

> "The minor who is subject to the possibility of a transfer order should not be put to the unfair choice of being considered uncooperative by the juvenile probation officer and juvenile court because of his refusal to discuss his case with the probation officer, or of having this statement used against him in subsequent criminal proceedings." *Bryan v. Superior Court, supra*, 7 Cal. 3d at 587-88, 102 Cal. Rptr. at 840, 498 P.2d at 1088 (1972).

It is highly unfair to expose a juvenile to this kind of uncertainty. And to the extent that this uncertainty leads to reticence, the fact-finding process of the juvenile court is hindered, a process which the plurality opinion in *McKeiver* clearly established should never purposefully be impeded. 403 U.S. at 543.

In sum, a requirement of prior transfer is the only mechanism which ensures fundamental fairness to the juvenile. Moreover, it best serves the interests of the juvenile court system, for in most instances, it is the most efficient procedure for deciding the transfer issue, and is best suited to the informal, rehabilitative nature of juvenile courts. Therefore, this *amicus* maintains that

the requirement of prior transfer does not justify withholding the double jeopardy protection from respondent, nor has there been any other justification advanced which would warrant such a result.

CONCLUSION

For the foregoing reasons, the Council urges that the decision below be affirmed.

Respectfully submitted,

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January 14, 1975

Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
ALABAMA				Ala. Code, tit. 13 § 264 (1958)		
ALASKA				Alaska Stat. § 47.10.060;[1] Alaska R. of Juv. Pro. 3(a) (1974)		
ARIZONA	Ariz. Juv. R. 12 (1973)					
ARKANSAS	Ark. Stat. Ann. § 45-224 (1964)					
CALIFORNIA					Cal. Welf. & Instn's. Code § 707 (1972) [2]	
COLORADO				Colo. Rev. Stat. Ann. §§ 22-3-6(4)(a)-(c)-8(1) (Supp. 1969)		
CONNECTICUT				Conn. Gen Stat. Ann. § 17-60(a) (Supp. 1974) (only allows transfer for murder)		

[1] See, In re *P.H.*, 504 P.2d 837 (1972).

[2] Naturally, this categorization discounts the decision under review.

Jurisdiction	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
DELAWARE	Del. Code Ann., tit. 10, § 938 (Supp. 1972)					
FLORIDA	Fla. Stat. Ann. § 39.09(2)(a) (1974)					
GEORGIA	Ga. Code Ann. § 24A-2501(a) (Supp. 1974)					
HAWAII			Hawaii Rev. Stat. § 571-49 (1968); Hawaii Rev. Stat. § 571-22(a) (Supp. 1973)			
IDAHO	Idaho Code § 16-1806(1)(a) (Supp. 1971) [3]					
ILLINOIS	Ill. Ann. Stat., ch. 37, § 702-7 (3)(1972)					
INDIANA			Ind. Stat. Ann. § 31-5-7-15 (1973); Ind. Stat. Ann. § 31-5-7-14 (1973)			
IOWA	Iowa Code. Ann. § 232.72 (1969) [4]					
KANSAS				Kan. Stat. Ann. § 38-808(b) (1973)		

[3] *See State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

[4] *See State v. Halverson*, 192 N.W.2d 765 (Iowa 1971).

Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
KENTUCKY				Ky. Rev. Stat. § 208.170(1) (1972), *as amended*, Ky. Rev. Stat. § 208. 170 (Supp. 1974)		
LOUISIANA		X				
MAINE				Me. Rev. Stat. Ann., tit. 15, § 2611(3) (1965)		
MARYLAND	Md. Ann. Code art. 26, § 70-16 (a) (1973)					
MASSACHUSETTS						Mass. Ann. Laws, ch. 119, § 61 (1969) Mass. Dist. Ct. R. 85A (1974) [5]

[5] *See* In re *Juvenile*, ___ Mass. ___, 306 N.E.2d 822 (1974).

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Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
MICHIGAN				Mich. Stat. Ann. § 27.3178 (598.4(4)) (1974)		
MINNESOTA	Minn. Juv. R. 8-1(2) (1974)					
MISSISSIPPI	Miss. Code Ann. § 43-21-31 (1973)					
MISSOURI					Mo. Ann. Stat. § 211.071 (1969) [6]	
MONTANA	Mont. Rev. Code § 10.[illegible] (Supp. 1974)					
NEBRASKA		X				
NEVADA				Nev. Rev. Stat. § 62.080 (1973)		
NEW HAMPSHIRE	N.H. Rev. Stat. Ann., § 169.21 (1964)					

[6] *See Carter v. Murphy*, 465 S.W.2d 28 (Mo. Ct. App. 1971).

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Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
NEW JERSEY			N.J. Stat. Ann. § 2A:4-39 (1952); N.J. Rev. Stat. Ann. 2A:4-48(b) (Supp. 1974)			
NEW MEXICO	N.M. Stat. Ann. § 13-14-27(a) (Supp. 1973)					
NEW YORK		X				
NORTH CAROLINA	N.C. Gen. Stat. § 7A-280 (1969)					
NORTH DAKOTA	N.D. Central Code § 27-20-34 (i) (1974)					
OHIO					Ohio Juv. R. 30(A) (1974)	
OKLAHOMA	Okla. Stat. tit. 10, § 1112 (b) (Supp. 1974)					

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Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
OREGON				Oregon Rev. Stat. § § 419.482, 419.507, 419.533 (1973)		
PENNSYLVANIA	Pa. Stat. Ann., tit. 11, § 50-325(a) (Supp. 1974) [7]					
RHODE ISLAND			R.I. Gen. Laws Ann. § 14-1-40 (1969); R.I. Gen. Laws Ann. § 14-1-7 (Supp. 1973)			
SOUTH CAROLINA				S.C. Code Ann. ch. 8, § 15-1281.13 (1962)		

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[7] *See Commonwealth ex. rel. Freeman v. Superintendent*, 212 Pa. Super. 422, 242 A.2d 903 (1968).

Jurisdiction	Column 1 Requires Prior Transfer	Column 2 Does Not Allow Transfer	Column 3 Has Strict Exclusionary Rule and Requires No Proof Relating to Charged Crime	Column 4 Probably Permits Transfer After Delinquency Determination	Column 5 Permits Transfer After Delinquency Determination	Column 6 Requires Transfer After Delinquency Determination
SOUTH DAKOTA				S.D. Compiled Laws Ann. §§ 26-8-22.7, 26-11-4 (Supp. 1974)		
TENNESSEE	Tenn. Code Ann. § 37-234 (a) (Supp. 1974)					
TEXAS	Tex. Fam. Code § 54.02(a) (2) (1973)					
UTAH			Utah Code Ann. § 55-10-105(3) (1973); Utah Code Ann. § 55-10-86 (1973)			
VERMONT		X				
VIRGINIA	Va. Code Ann., § 16-176(a)(2) (Supp. 1974)					

[8] *See Lewis v. Howard*, 374 F. Supp. 446, 449 (W.D. Va. 1974).

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	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
WASHINGTON		X				
WEST VIRGINIA						W.Va. Code Ann. § 49-5-14 (1966)
WISCONSIN	Wisc. Stat. Ann. § 48.18 (Supp. 1974)					
WYOMING	Wyo. Stat. Ann. § 14-115.38 (Supp. 1973)					
DISTRICT OF COLUMBIA	16 D.C. Code § 2307(a)					
FEDERAL GOVERNMENT	18 U.S.C. § 5032 as amended by Public Law 93-415, § 502					
TOTALS	25	5	5	12	3	2

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Supreme Court, U. S.
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JAN 8 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to the filing of this brief has been given by the Office of the Attorney General of the State of California, counsel for petitioner, and by Mr. Robert L. Walker, Esq., counsel for respondent. Letters of consent from both counsel should be on file with the Clerk of this Court.

Interest of the Amicus Curiae

The California Public Defenders Association is a nonprofit corporation, incorporated under the laws of the State of California in 1969. It was formed to assist public defender offices in California in their efforts to secure the constitutional rights of indigent defendants by vigorous and competent representation. The Association represents approximately 600 defense attorneys from 34 public defender offices throughout the State of California.

A decision by this Court in the instant case could have a substantial impact upon every minor appearing before a juvenile court in California, by subjecting him to double jeopardy, by inhibiting him from presenting a defense on the merits to an accusation of juvenile delinquency, and/or by inhibiting him from candidly discussing the facts of his case with the juvenile court judge. Accordingly, the California Public Defenders Association is filing this brief as amicus curiae pursuant to the authority of its Board of Directors and the unanimous vote of its Committee on Amicus Briefs.

I

THE CALIFORNIA CONSTITUTION INDEPENDENTLY PROTECTS MINORS APPEARING BEFORE THE JUVENILE COURT FROM DOUBLE JEOPARDY, INCLUDING MOST FORMS OF CONTINUING JEOPARDY. GIVEN THIS FACT, THE ACTUAL CASE OR CONTROVERSY PRESENTED BY THIS CASE IS AN EXCEEDINGLY NARROW ONE, MERELY ARISING FROM AN ISOLATED INCIDENCE OF DEPARTURE FROM APPROVED METHODS OF PROCEDURE.

Introduction to the First Argument

In reading the Petition for Writ of Certiorari and the Petitioner's Opening Brief, we are struck by certain apparent contradictions and shifts of position as to the nature of the questions before this Court, and their significance. Petitioner's apparent uncertainty as to these matters lead amicus to feel that some further discussion of, one, what questions are properly before the Court in this case; and, two, the actual significance of those questions, would be useful.

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At page 12 of the Petition for Certiorari,[1] petitioners seem to suggest--perhaps in response to the broadness of some of the language in the Ninth Circuit's opinion--that this case should be used as a vehicle for an overall redefinition of the concept of double jeopardy, at least as it relates to juvenile cases. At pages 14-21 of the Petitioner's Opening Brief, however, it is conceded that the broad question of the application of the federal bar against double jeopardy to California proceedings is not properly before the Court. We agree with petitioner in this respect.

In the following paragraphs, we shall set out, in detail somewhat greater than that afforded by petitioners the nature of the State decisions in this area.

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(1)". . . This Court has recognized that 'a concept of continuing jeopardy has application where criminal proceedings against an accused have not run their full course.' Price v. Georgia, 398 U.S. 326 (1970). Although the Court below would narrowly confine that concept to retrials which follow appellate reversals of criminal convictions this Court has never intimated that continuing jeopardy is limited to that context."

After devoting some incidental discussion to the historical underpinnings of those decisions, we shall demonstrate how they operate to severely narrow the question which this case presents for review. We shall conclude the argument by discussing briefly our views as to the proper resolution of the narrow question thus remaining, proceeding finally to comment upon the practical impact which a decision of that question by this Court might have.

A. Minors Facing Juvenile Proceedings are Independently Protected From Double Jeopardy, Including Most Forms of "Continuing" Jeopardy, by the California State Constitution.

Article I, Section 13, Clause 4 of the California Constitution (West 1974) provides, "No person shall be twice put in jeopardy for the same offense." In the case of Richard M. v. Superior Court, 4 Cal.3d 370, 93 Cal.Rptr. 752, 482 P.2d 664 (1971), the California Supreme Court, in a unanimous opinion, gave effect to this provision with the following language:

> "In proceedings before the Juvenile Court, juveniles are entitled to Constitutional protections against twice being placed in jeopardy for the same offense (U.S. Const. Amends. V, XIV; Cal. Const. Art.I §13 . . .)." 4 Cal.3d at 375, 93 Cal.Rptr. at 756, 482 P.2d at 668.

Drawing an analogy to bench trials in criminal cases, the California court went on to conclude that jeopardy attaches in a juvenile proceeding at the time trial on the merits is "entered upon". 4 Cal.3d at 376, 93 Cal.Rptr. at 756-757, 482 P.2d at 668-669.(2)

The Richard M. case, supra., involved an attempt by the juvenile court to retry a minor which it had already tried and acquitted. Approximately two years later, the California court resolved, in the negative, any remaining doubts as to whether its construction of the independent

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(2) In Bryan v. Superior Court, 7 Cal.3d 575, 581, 102 Cal.Rptr. 831, 835, 498 P.2d 1079, 1083 (1972), the California court emphasized the dual grounds of the Richard M. decision by characterizing it as having been based upon the dual bars to double jeopardy found in both state and federal constitutions.

state and federal prohibitions against double jeopardy would permit application of a general concept of "continuing" jeopardy to juvenile proceedings.

In In re James M., 9 Cal.3d 517, 108 Cal.Rptr. 89, 510 P.2d 33, a juvenile had been accused of felonious assault upon a police officer.(3) The juvenile court evidently was unable to conclude that the charged offense had taken place; nevertheless, over the juvenile's objection, it convicted him of "attempted assault!" On appeal, the State assumed that there was no crime of "attempted assault" under California law, but asked that the matter be remanded to the juvenile court for a second trial at which the juvenile could be found guilty of the completed charge of assault.

The State Supreme Court, after holding that there was indeed no crime of "attempted assault" in California, reversed with directions to dismiss the case entirely. In rejecting the State's argument, the Court stated, again unanimously,

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(3)California Penal Code Section 245, Subdivision (b).

"The trial court's finding that James was guilty of only attempted assault . . . . constituted an implied acquittal of the charged assault itself. He could not be tried again for an offense of which he had been acquitted. Protection against double jeopardy applies to juvenile offenders as well as to adults. (U.S. Const., 5th Amend.; Cal.Const. Art. I, Sec. 13.)" 9 Cal.3d at 520, 108 Cal.Rptr. at 91, 510 P.2d at 35.

While the James M. decision rests independently upon the State Constitution, it is, of course, directly parallel to the opinions of this Court which refuse to recognize any concept of continuing jeopardy under the Fifth Amendment, e.g., Kepner v. United States, 355 U.S. 184 (1957); Price v. Georgia, 398 U.S. 323 (1970) (per Burger, C.J.).(4)

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(4)Neither the opinion of the Ninth Circuit, the Petition for Certiorari, nor petitioner's opening brief cite In re James M. Consequently, no discussion is devoted in either

B. The Conclusion that Juveniles are Protected From Double Jeopardy by the State and Federal Constitutions Follows Inexorably From the Entire History of Western Jurisprudence.

That the State Supreme Court should attach a construction to the double jeopardy provisions of the California Constitution equivalent to that which this Court has ascribed to the Fifth Amendment, and that it should also conclude that both provisions are independently applicable to juvenile proceedings, should not come as a surprise. cf. Petitioner's Opening Brief, pages 14-15.

The prohibition against two trials of any one cause has always been an essential part of the jurisprudence of Western man, beginning in ancient Greece, continuing through Roman law and Canon law; by the Thirteenth Century, it had become firmly established in the Common law of England. Bartkus v. Illinois, 359 U.S. 121, at 151-155 (Black, J., dissenting) (1959),

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place to California's general rejection of the concept of continuing jeopardy in juvenile cases.

and the extensive documentation there cited.(5)

It has also been observed by this Court that by the time of Blackstone, the rule that there should only be one trial of a given cause was applied with equal force to both civil and criminal cases:

> ". . . In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause nemo debet bis vexari pro una et eadem causa. . . ."
>
> "(In criminal cases) The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been

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(5) A decade later, the impressive scholarship contained in Justice Black's dissent in Bartkus was instrumental in convincing the Court to apply the bar against double jeopardy to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 795 (1969).

acquitted or convicted." Ex Parte Lange, 85 U.S. (18 Wall.) 163, 168-169 (1873).

As the antecedents of the bar against double jeopardy were evolving, so were the antecedents of the California juvenile court. In 1924, the California Supreme Court noted that California's juvenile courts had evolved directly from concepts of probate jurisdiction, specifically that of parens patriae, which are equally rooted in the law of ancient England.

> "The theory that the State and its instrumentality, the court, is the guardian of all such minors as require its care and protection is of ancient origin, looking back into feudal times in England when the Crown, through the inquisitio post mortem had the matter of the supervision over the estates of minors. . . . /T/he jurisdiction of this court was transferred to the court of chancery through which the King, as we are told by Blackstone, in his capacity of parens patriae, assumed the general protection. . .

> of all infants in his kingdom through the keeper of his conscience, the Chancellor. . . . The doctrine (of parens patriae) . . . thus became a part of the British system of government and of jurisprudence and the jurisdiction of courts of equity thus firmly established in the English law passed to this country upon the establishment of courts of law and equity in its various states. . . ." In re Daedler, 194 Cal. 320, 324-325, 228 P.467, 469 (1924).(6)

No special "prescience" is needed, therefore, to conclude that the concept of double jeopardy and the California juvenile court both evolved directly from roots which were both integral parts of the same corpus juris. Just as the English antecedents of

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(6) An illuminating view of the exercise of pre-juvenile court parens patriae jurisdiction, which by its similarity to modern practice underscores the nonspontaneous origins of the juvenile court, is provided in Ex Parte Crouse, 4 Whart. (Pa.) 9, 11 (1839).

double jeopardy barred multiple litigation of the same contested facts before the Chancellor,(7) so is the modern-day codification of those antecedents found in the federal and state constitutions applicable to the contemporary exercise of parens patriae jurisdiction in the juvenile court.

It is the genius of our Common law system that old principles may be applied to new, but analogous situations as the occasion arises. When reasoning thus by analogy, one can hardly expect the old factual situation to be identical to the new context to which the enduring principle is applied. If it were otherwise, there would be no growth of the law, merely an application of static principles to repetitious fact patterns. As Mr. Justice McKenna once aptly stated,

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave its birth. This is peculiarly true of constitutions.

(7) J. Story, Commentaries on Equity Pleadings, 602-605 (2nd Ed. 1840).

> They are not ephemeral enactments designed to meet passing occasions. Weems v. United States, 217 U.S. 349, 373 (1910).(8)

C. The "Independent State Ground" Doctrine Limits the Scope of the Controversy Herein Almost to its Own Facts.

Petitioner's concession (Petitioner's Opening Brief, page 19) that the California decisions applying the protection against double jeopardy to juveniles rest upon independent State grounds requires the conclusion that the broad federal questions which this case might otherwise present for decision do not constitute a "case or controversy" within the meaning of Article III, Section 2 of the Constitution.

In Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), this Court decided that it had no jurisdiction to review questions of state law which had been

(8) We are grateful to petitioner's counsel for having so ably framed the above paragraph for us at pages 29-30 of his opening brief.

determined by state courts, even though a federal question might also be present in a given case. This conclusion having been reached, it followed easily enough that it would amount to the giving of an advisory opinion for the Court to decide federal questions in a case where the result was controlled by state law, regardless of how the federal issues were resolved. Herb v. Pitcairn, 324 U.S. 117 (1945).

In Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935), the Court stated:

> "(W)here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."

See also Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965); California v. Krivda, 409 U.S. 33 (1972); Aikens v. California, 406 U.S. 813 (1972).

Thus, given the Richard M. and James M. decisions, supra., and the doctrine of the independent nonfederal ground, it becomes apparent that the question remaining for

decision by this Court is an exceedingly, if not excessively narrow one; one which, incidentally, this Court has refused to decide on a very recent prior occasion. Bryan v. Superior Court, 7 Cal.3d 575, 102 Cal.Rptr. 831, 498 P.2d 1079 (1972), Cert. den. sub nom., Bryan v. California, 410 U.S. 944 (1973). That question is whether the narrow exception which the state courts have carved out of their double jeopardy decisions in Bryan and the instant case passes federal constitutional muster.

This exception might be defined as follows:

> On any given charge, assuming (absent waiver) that jeopardy bars a second trial in either juvenile or criminal court where the juvenile has not been found "unfit" and where a final judgment of acquittal or an appealable dispositional order has been entered, is a second trial in criminal court nevertheless permissible where the minor has been found "unfit" at some time after a trial on the merits has begun in juvenile court?

It is worth noting at this point that Section 606 California Welfare and Institutions Code prohibits the trial of a juvenile in criminal court unless he has been found unfit for juvenile court under Section 707. Section 606 contains no guidance, however, as to the stage of the proceedings at which a finding of unfitness may occur, or, for that matter, as to the sufficiency of any evidence which may have been presented up to that point.

Under the anomalous[9] Bryan exception, even if the evidence of guilt was palpably insufficient, it would be entirely possible for the juvenile court to simply declare a minor unfit at any time after the presentation of evidence had begun, prior to the announcement of any verdict, by simply seizing on some incidence of misbehavior in the minor's past, the presence of which is all but inevitable unless the minor has been living in an iron lung. See Donald L. v. Superior Court, 7 Cal.3d 592, 600-601,

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[9] See Note, Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts, 24 Stan.L.Rev. 874, 880-881 (1972).

102 Cal.Rptr. 850, 855, 498 P.2d 1098, 1103 (1972).

Were such a thing to happen, the result would be an injustice easily a dozen times worse than that which might result were a minor required to stand trial twice in juvenile court. Even if he were ultimately acquitted, the minor, upon being found unfit, would be transferred from the ostensibly homelike[10] surroundings of Juvenile Hall to the stark environs of the County Jail. There he could be held for at least 10 days pending a preliminary examination,[11] and then for a minimum of an additional 60 days after the filing of an information.[12] As California law renders minors incapable of disposing of property or of entering into contracts,[13] it is unlikely indeed that the minor would be able to post bail during this time.

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[10] California Welfare and Institutions Code Section 851.

[11] California Penal Code Section 859(b).

[12] California Penal Code Section 1382.

[13] See California Civil Code Sections 25, 33, 211.

The Bryan decision appears to have been based upon pragmatic fears that juvenile judges would declare minors unfit for improper reasons were a different result reached. 7 Cal.3d at 584, 102 Cal.Rptr. at 837, 498 P.2d at 1085. But as we have pointed out above, a different pragmatic problem has simply been substituted, whereby courts may be encouraged to say "unfit" instead of "not guilty" in cases where the evidence is weak, but the Court or prosecutor has a hunch that, given a second chance, enough evidence might be educed to support a conviction.

We do not think that the meaning of the Constitution can be made to change upon fears or presumptions that courts of law are going to act improperly. For, to engage in such a presumption ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile system contemplates." McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

Equally fundamental to the proposition that rules of law ought not to be based on assumptions that courts are going to act improperly is the fact that nowhere in our constitutional system has the

content of fundamental rights been made to turn on invidious ad hominim considerations. For the State Court to hold, in effect, that jeopardy attaches and terminates, respectively, at the beginning and end of a juvenile court trial,[14] unless the minor happens to be an incorrigible little so-and-so, simply will not do. If nothing else, the invidious situation created by the State Court's resolution of the jeopardy issue under its own law raises a serious problem of equal protection of the laws.

But for all the ways in which the Bryan decision might be criticized, it remains that further resolution of the controversy presented herein and in Bryan will have an immediate effect upon perhaps ten individuals within California, aside from respondent Jones.

This is for the reason that, under current practice, virtually 100 percent of all fitness

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[14] It is worth reiterating at this point that the California court has held that jeopardy terminates at the end of trial for purposes of barring the State from appealing. In re James M., supra.; Bryan v. Superior Court, supra., 7 Cal.3d at 583, 102 Cal.Rptr. at 837, 498 P.2d at 1085.

determinations are made prior to trial, at the "very outset" of theproceedings. See California College of Trial Judges, California Juvenile Court Benchbook, Section 10.4 (pp. 190-191) (1971), commended by the California Supreme Court in Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal.Rptr. 850, 853, 498 P.2d 1098, 1101 (1972). California's actual practice in this respect is typical of what takes place in most American jurisdictions, and conforms to the recommendations of the National Conference of Commissioners on Uniform State Laws. Uniform Juvenile Court Act, Section 34; Rule 9; Model Rules for Juvenile Courts (National Council on Crime and Delinquency, 1969); and see the 15 state statutes cited by petitioner at pages 47-48 of his opening brief.(15)

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(15)We think it neither unfair nor inappropriate to state our opinion, based upon many years of experience with the Los Angeles County Juvenile Court, that this case arises principally because there happens to have been a single juvenile referee in Los Angeles with a documented penchant for touching off appellate brouhahas by taking unconventional and sometimes premptory actions during or at the close of trials. See In re Dana J., 26 Cal.App.3d 768, 103 Cal.Rptr. 21 (1972); Appendix, p. 22; see also generally In re Henry G., 28 Cal.App.3d, 276, 104 Cal.Rptr. 585 (1973).

The practical impact of the Ninth Circuit's opinion upon the ongoing practices of the California Juvenile Court has been slight indeed; it has served only to correct a solitary and isolated deviation from standard practice. Quite contrary to what petitioner suggests at pages 36-45 of his opening brief, no one has supposed that the Ninth Circuit has required any "cumbersome preliminary hearing" to be conducted prior to a fitness hearing. It is doubtless because of the much greater "cumbersomeness"--not to mention unfairness--of having a whole trial before a fitness hearing that California courts have made it the standard procedure to consider fitness prior to trial; and the California legislature has consistently refused to require that the adjudication hearing precede the fitness hearing. Donald L. v. Superior Court, supra., 7 Cal.3d at 597, 102 Cal.Rptr. at 853, 498 P.2d at 1101.

Left undisturbed, therefore, the opinion of the Ninth Circuit changes little; this fact raises in our mind a substantial question of whether a further stirring of the narrow controversy presented herein by this Court would be a provident use of judicial

resources. On the other hand, as we shall develop more fully in Part II, post, a decision on the merits in favor of petitioner, which would have the effect of encouraging juvenile courts to abandon their heretofore preferred practices, would radically alter the status quo; in the process, many of the constitutional concepts which have been considered fundamental in our free society will have been assaulted, and a further blow will have been dealt to the chances for the success of the juvenile court.

II

THE RULE URGED BY PETITIONERS WOULD ALLOW A JUVENILE PROCEEDING TO BE CONVERTED INTO A MERE INQUISITION PRELIMINARY TO A CRIMINAL CASE. THE RESULT WOULD BE DESTRUCTIVE OF THE JUVENILE COURT AND FUNDAMENTALLY UNFAIR TO ALL MINORS WHO APPEAR BEFORE IT, WHETHER THEY ARE "FIT" OR "UNFIT" FOR JUVENILE COURT.

Introduction to the Second Argument

Should petitioner prevail on the merits in this case, there is every danger that juvenile courts in California and elsewhere might change their standard procedure and, freed from any residual doubts as to the constitutionality of such procedure, begin holding large numbers of minors unfit for juvenile court at the dispositional phase of the proceedings, after an adjudication hearing had taken place.

We feel the effect of this would be evil indeed; it would likely destroy any remaining hope that the juvenile court can actually function in the best interest of minors by converting its once paternal and informal hearings into preliminary inquisitions, to

be used to afford unfair advantage to the prosecutor in a later criminal prosecution.

For this reason, minors accused of juvenile delinquency would be severely inhibited from presenting to the juvenile court their explanation of the facts or from calling witnesses in their defense. In short, the result would be a universal distortion of the accuracy of the fact-finding process in juvenile court and a further invidious discrimination against those minors who are later tried as adults, as if a sixteen-year-old facing life in the penitentiary is not under enough of a handicap already.

Mr. Justice Blackmun, in his recent plurality opinion in McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) has observed that, "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." To this we would add that if the Draconian informalities of the pre-constitutional criminal law are to be allowed to work their way into that system, there is even less of a reason for its continued existence. To

paraphrase John Gay, an open foe--in the form of the State openly pressing criminal charges--may prove a curse, but a pretended friend--in the form of a juvenile judge coaxing information out of an unwary minor for the later advantage of the state in a criminal trial--is far worse. See Spano v. New York, 360 U.S. 315, 323 (1959).

A. As it is Indispensable to Accurate Fact-finding, the Right to Present a Defense to an Accusation of Criminal Conduct is an Essential Element of Due Process.

In its landmark decision in In re Gault, 387 U.S. 1 (1967), this Court held that minors appearing before the juvenile court were guaranteed due process of law. Among other things, the Court specifically included in its concept of due process for minors the traditional Sixth Amendment rights to notice, to the assistance of counsel and to confront and cross-examine witnesses.(16)

The Court has subsequently sharpened and clarified this decision to emphasize that

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(16) There were a total of five opinions written in Gault. While there was considerable divergence throughout these opinions,

the primary concern of the due process clause is the fairness and accuracy of the fact-finding or adjudicatory stage of the proceedings; the Court has, therefore, extended to minors certain rights which it considered essential to accurate fact-finding,[17] while refusing to extend others which were considered nonessential.[18]

It has long been assumed that the rights to notice, counsel and compulsory process contained in the Sixth Amendment form a constellation, the purpose of which is to "permit any individual who was charged with any crime, to prepare his defense. . . ." United States v. Burr, 25 Fed. Cas. 30, 32 (#14, 692d, C.C.D. Va. 1807) (Per Marshall, C.J.).

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they approach unanimous agreement on the proposition that one or more of these Sixth Amendment rights should be afforded to minors. See 387 U.S. at 61 (Black, J., concurring); 64 (White, J., concurring); 72 (Harlan, J., concurring and dissenting); 80-81 (Stewart, J., dissenting).

(17) In re Winship, 397 U.S. 358 (1970); Ivan V. v. City of New York, 407 U.S. 203, 204 (1972). (Proof beyond a reasonable doubt).

(18) McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971). (Jury trial).

At Common law, an accused was denied the right to testify or to call witnesses in his defense; he was defended only by the argument that the case against him had to be completely proved. The theory behind this rule was that if the state presented adequate prima facie proof of quilt, no witnesses or counsel on the other side needed to be attended to; if the state's evidence was insufficient, none were needed. H. Stephen, "The Trial of Sir Walter Raleigh," Transactions of the Royal Historical Society, 172, 184 (4th Ser. Vol. 2, 1919). Needless to say, this primitive rule was ruinous in its effect on the accuracy of fact-finding.

> "Witnesses for the Government may swear falsely and directly to the matter in charge, and until opposing testimony is heard there may not be the slightest doubt as to its truth, and yet, when such is heard, it may be incontestable that it is wholly unworthy of belief. . . ." J. Story, Commentaries on the Constitution of the United States, Sec. 1792 at 548-550 (4th Ed. 1873).

By enactment of the Sixth Amendment, therefore, a proper concern for factual accuracy was injected into a system which had once been content to feel that it was an "honor" to the law that its pristine majesty did not permit the accused to defend themselves; for "respectable" people simply weren't indicted. D. Mellinkoff, The Conscience of a Lawyer, 51-52 (1973).

That one of the Sixth Amendment's purposes was to constitutionalize the fundamental right to a defense has been recognized in many contemporary opinions of this Court. In In re Oliver, 333 U.S. 257, 273 (1948), the Court held that, "failure to afford the petitioner a reasonable opportunity to defend himself. . . was a denial of due process of law. A person's right to reasonable notice of the charge against him, and an opportunity to be heard in his defense. . . are basic to our system of jurisprudence. . . ." Accordingly, in Washington v. Texas, 388 U.S. 14, 17 (1967), the Court held that as the Sixth Amendment right to compulsory process is tantamount to the right to present a defense, it would be applied to

the states through the Due Process Clause of the Fourteenth Amendment. Earlier that year, the same rule had been announced in mental commitment cases which are similar to juvenile proceedings in their parens patriae origins. Specht v. Patterson, 386 U.S. 605, 610 (1967). See also California v. Green, 399 U.S. 149, 176-177 (1970) (Harlan, J., concurring); Chambers v. Mississippi, 410 U.S. 284 (1972) cf. Williams v. Florida, 399 U.S. 78, N.14 at 83 (1970); Wardius v. Oregon, 412 U.S. 470 (1973).

As they are indispensable to the fairness and accuracy of the fact-finding process in a proceeding wherein the minor's liberty is in jeopardy, the rights to testify and to present evidence in one's own defense are fundamental, and are guaranteed to minors through the Due Process Clause of the Fourteenth Amendment.

B. An Impermissible Chilling Effect Upon the Fundamental Right to Present a Defense is Created Where the Minor Must Fear That If He Presents Evidence, It Will Be Used by the Public Prosecutor, Who is Present in the Juvenile Court, to Put Him at a Disadvantage in a Later Criminal Prosecution.

Whether to take the witness stand in one's own behalf or to call a given witness in one's defense always presents an accused and his counsel with a difficult decision. When that decision is further complicated by the consideration that by testifying or calling witnesses, one may be simply feeding ammunition to the prosecutor to use to the minor's disadvantage in a later criminal prosecution on the same charge, the minor is necessarily deterred from exercising his constitutional right to present his version of the facts to the juvenile court.

In California juvenile courts, the District Attorney is generally present during all adjudication hearings. His function there is to "assist in the ascertaining and presenting of the evidence."

Cal. Welf and Inst's. Code Sec. 681.[19] A Deputy District Attorney did in fact appear at the adjudication hearing before the juvenile court in this case. App. pg. 17.

The District Attorney's principal duty, under California law, is to "attend the courts and conduct on behalf of the People all prosecutions for public offenses." Cal. Gov't. Code Sec. 26500. He is charged with drawing all indictments and informations, and with attending sessions of the grand jury and the committing magistrates. Cal. Gov't. Code Sec.'s 26501, 26502. In short, the District Attorney is the criminal prosecutor for the state.

When a minor appears before a California juvenile court, therefore, he also appears

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[19] The participation of the District Attorney in contested adjudication hearings, while ostensibly optional, has been rendered mandatory in contested adjudication hearings by state court decisions. Lois R. v. Superior Court, 19 Cal.App.3d 895, 97 Cal.Rptr. 158 (1971); Gloria M. v. Superior Court, 21 Cal.App.3d 895, 98 Cal.Rptr. 604 (1971); In re Ruth H., 26 Cal.App.3d 77, 102 Cal.Rptr. 534 (1972) (hrg. den. by Cal. Supreme Ct., Aug. 9, 1972).

before the public prosecutor. As he or his witnesses testify, that prosecutor is afforded full knowledge of every detail of minor's defense to the charge. There is nothing to stop him from using this information to gain considerable tactical advantage over the minor at a later criminal trial.(20) It is, after all, incontestable that if one were to go into a criminal trial with the prosecutor knowing in advance every detail of factual evidence possessed by the minor, as well as every turn of legal argument to be presented by counsel, the prosecutor would be in a position to build an abnormally strong rebuttal case, which might prove misleading to the trier of fact in the criminal court. There is also the possibility that, knowing the identity of every person who will testify for the defense,

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(20) In Bryan v. Superior Court, supra., 7 Cal.3d at 586-589, 102 Cal.Rptr. at 839-841, 498 P.2d at 1087-1089, the California Supreme Court held that evidence of a confession or plea of guilty in juvenile court could not be used in a criminal proceeding. No attempt was made to forbid use of the minor's other testimony, nor was any attempt made to prohibit the prosecutor from using what he may learn from a minor to place him at an unfair disadvantage.

overzealous prosecuting authorities might take subtle or not-so-subtle actions aimed at intimidating and discrediting such witnesses. See Reynolds v. Superior Court, 12 Cal.3d 834, NN. 17-18 at 846-847, 117 Cal.Rptr. 437, 445,_____ P.2d____(1974).

This is constitutionally intolerable for the reason that it creates a "chilling effect" upon the exercise of the fundamental right to present a defense; obviously, it also renders a sham any pretense that the hearing is being conducted for the minor's benefit.

In United States v. Jackson, 390 U.S. 570 (1968), the Court held that a portion of the federal kidnapping act which provided that the death penalty could be imposed only by a jury was void for the reason that it inhibited the exercise of the rights to a trial and to a trial by jury:

> "Whatever might be said of Congress' basic objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. (Citations omitted) The question is not whether the chilling

effect is incidental rather than intentional; the question is whether that effect is unnecessary and, therefore, excessive." 390 U.S. at 582.

Similarly, in Shelton v. Tucker, 364 U.S. 479 (1960), a requirement that prospective school teachers list all organizations to which they had belonged or contributed to in the past five years was held void for its chilling effects upon the teachers' exercise of their rights of free speech and association, the Court noting that, "scholarship cannot flourish in an atmosphere of suspicion and distrust." 364 U.S. at 487. See also N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (State regulation of legal profession may not operate to inhibit otherwise lawful pursuit of social betterment through litigation); United States v. Robel, 389 U.S. 258 (1967) (Overbroad regulation banning all members of designated organizations from defense employment held to unduly inhibit exercise of the right of free association.)

More recently, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court, in an

opinion by the Chief Justice, echoed the theory of United States v. Jackson by holding that an employment aptitude test which had racially discriminatory effects could not be used under the Federal Civil Rights Act,(21) where the test did not serve the purpose of separating qualified from unqualified job applicants, even though the discriminatory effects may have been unintentional. Finally, in Chaffin v. Stynchcombe, 412 U.S. 17, N. 20 at 32-33 (1973), the Court, speaking through Mr. Justice Powell, noted that, "/United States v./ Jackson. . . /Is/. . . clear and subsequent cases have not dulled /its/ force."

The unlimited prosecution discovery afforded when a minor testifies or calls witnesses will necessarily inhibit the vigor with which the minor defends himself. He will have to fear that if he does not keep a few trump cards, so to speak, off the table, he will have given the prosecutor everything he needs to obtain a conviction in criminal court.

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(21) 42 U.S.C. 2000e, et. seq.

This will distort the fact-finding process, as the withheld "trump cards" may be just what is needed to create a reasonable doubt in the mind of the juvenile court. It will tend to cause the adjudicative process to resemble a criminal trial as it would have been conducted before the Sixth Amendment, when criminal charges often appeared stronger than the truth because they were not answered. See 2 J. Story, Commentaries on the Constitution of the United States, 550, supra., (4th Ed. 1873).

C. The Uncontrolled and Nonreciprocal Prosecution Discovery Which Would Result If Petitioners Prevail is Also Per Se a Violation of Due Process.

While it has been held that certain forms of prosecution discovery, when carefully controlled so as to insure that the accused is not put at an unfair disadvantage, are permissible, Williams v. Florida, 399 U.S. 78 (1970), no court has ever sanctioned uncontrolled and

nonreciprocal prosecution discovery. In Wardius v. Oregon, 412 U.S. 470 (1973), the Court held that while the due process clause may have little to say about the amount of pretrial discovery which must be afforded, "it does speak to the balance of forces between the accused and his accuser. Cf. In re Winship, 397 U.S. 398. . . ." A footnote then states, "Indeed, the state's inherent information gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." 412 U.S. at 474-475; cf. Reynolds v. Superior Court, 12 Cal.3d 834, 117 Cal.Rptr. 437,____P.2d____(1974), in which the California Supreme Court has refused to sanction any prosecution discovery absent legislation, nor to provide judicially for a system of reciprocal discovery.(22)

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(22)We are led at this point to also recall Mr. Justice Jackson's famous observation that "/A/Common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without ~~witnesses~~ witnesses or on ~~witnesses~~ witnesses borrowed from the adversary." Hickman v. Taylor, 329 U.S. 495, 516 (1947).

In the factual context at hand, were the State to gain unrestricted discovery of the minor's defense, in a juvenile hearing, it would be under no duty to disclose in advance what rebuttal evidence would be presented at the criminal trial. In Wardius, supra., the Court was careful to stress that such reciprocity was the essential underpinning of the ruling in Williams v. Florida. Cf. Rule 12.1, proposed Federal Rules of Criminal Procedure (1974).(23)

Clearly, the standard established in Wardius is violated by the result sought by petitioner.

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(23) That there are substantial interests to be lost upon the enactment of rules permitting even carefully controlled prosecution discovery is shown by the consistent refusal of the California legislature to enact a notice-of-alibi statute, despite repeated attempts dating to the 1930's. The Congress has similarly displayed its concern by holding up approval of the proposed Federal Rules of Criminal Procedure. Reynolds v. Superior Court, supra., 12 Cal.3d at 846-847, NN. 17-18, 117 Cal.Rptr. at 445____ P.2d at____ (1974).

D. As California Appellate Courts Would Not Correct a Miscarriage of Justice Resulting From an Erroneous Finding of Guilt Due to a Withheld Defense, it is Doubly Important That No Inhibition be Placed Upon the Right to Freely Present Evidence.

Matters are made worse by the fact that California appellate courts would not rectify the conviction of an innocent juvenile who withheld his defense in fear of its use against him in a later criminal case. California courts adhere to a unique standard of appellate review,(24) whereby only the sufficiency of the evidence educed by the State will be considered on appeal; the reviewing court will not consider the totality of the evidence, nor decide whether there was proof beyond a reasonable doubt. People v. Newland, 15 Cal.2d 678, 681-682, 104 P.2d 778, 780

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(24) The uniqueness of the California standard of factual review, with comparison to the prevailing rules in other jurisdictions, is discussed in People v. Blum, 35 Cal.App.3d 515, 521-530, 110 Cal.Rptr. 833, 836-843 (1973) (dissenting opinion) Cert. den.____ U.S.____, 94 S.Ct. 2401 (1974).

(1940); People v. Reilly, 3 Cal.3d 421, 425, 90 Cal.Rptr. 417, 419, 475 P.2d 649, 651 (1970); People v. Reyes, 12 Cal.3d 486, 496-497, 116 Cal.Rptr. 217, 223, 526 P.2d 225, 231 (1974). This standard of review has been made applicable to juvenile cases. In re Roderick P., 7 Cal.3d 801, 103 Cal.Rptr. 425, 500 P.2d 1 (1972).

While this case does not directly present an issue of the constitutionality of California's standards of appellate review, their existence makes it doubly important, for purposes of the due process clause, that no condition be created which will prevent cases from being fully tried and accurately resolved before the juvenile court. See McKeiver v. Pennsylvania, supra., 403 U.S. 528, 547 (1971).

E. Conclusion to the Second Argument

Considerations of appellate review apply especially to those who are ultimately not found unfit for juvenile court; however, the effect of the withheld defense on those who are remanded to adult court is equally unfair. Where a minor is forced to

withhold his defense for tactical reasons, he virtually insures his conviction in juvenile court. Moreover, as we have pointed out (Pg. 18 , ante), there is nothing to prevent the juvenile court from simply saying "unfit" instead of "not guilty" in a case where the State presents a weak case, or it appears there is some other legal impediment to the entry of a "guilty" verdict.

With the minor effectively inhibited from presenting a defense, the net effect of the process, therefore, is to afford the prosecutor two bites at the apple of conviction through exploitation of the inherent mathematical advantage provided by trying a given case twice. Note, Twice in Jeopardy, 75 Yale L.J. 262, N. 74 at 278 (1965),[25] cited by the Court in

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[25] "If the evidence were such that one in four (fact-finders) would convict, and three in four acquit, the probability of conviction if the defendant is tried once is, of course, one in four (4/16). If two trials were permitted, the defendant would have to convince two (fact-finders) of his innocence and the probability of one of the two convicting would be 1-(3/4 X 3/4)= (7/16). . . . If one had to convince five (fact-finders) his probability of conviction would rise to over three in four."

Ashe v. Swenson, 397 U.S. 436, N. 10 at 446 (1970); see also Waller v. Florida, 397 U.S. 387 (1970).

That this chilling effect and resultant distortion of the fact-finding process is unnecessary is shown by the near universal practice of the state courts of eschewing it. (Pg.19-20, ante) That it is unnecessary to have a trial on the merits before a fitness determination can be made is also shown by the fact that the primary standard to be applied is the minor's amenability to treatment, not the seriousness of his offense. Jimmy H. v. Superior Court, 3 Cal.3d 709, 714, 91 Cal.Rptr. 600, 603, 478 P.2d 32, 35 (1970); Bruce M. v. Superior Court, 270 Cal.App.2d 566, 75 Cal.Rptr. 881 (1969); Richerson v. Superior Court, 264 Cal.App.2d 729, 70 Cal.Rptr. 350 (1968).

The State's legitimate interests in convicting the guilty are adequately served by one trial; if that trial is to be in criminal court, that determination can be made--as it is in the case of all defendants over age 18--without first trying the case in juvenile court. This being so, the chilling effect upon the fundamental rights

to defend oneself created by the threat of reprosecution in criminal court following a post-trial finding of unfitness are impermissible under the doctrine of United States v. Jackson.

CONCLUSION

For the reasons set out above, Amicus respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AND THE COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AS *AMICI CURIAE*

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Interest of the *Amici Curiae*

The National Council on Crime and Delinquency is a non-profit membership corporation, incorporated in 1921 as a national service agency. Since that time the NCCD has endeavored to develop standards and guides for the improvement of juvenile court work and other phases of the correctional field. It presently has a membership of over 60,000 citizens and officials. The representative nature of the Council is further indicated by the make-up of its officers and Board of Trustees, which is annexed as Appendix A for the information of the Court.

In conjunction with its advisory arm, the Council of Judges, NCCD has drafted model legislation covering many aspects of the justice system. It is the publisher of the Standard Juvenile Court Act, now in its sixth edition. In addition to developing model standards, NCCD provides consultation and research for courts and other agencies. Through its activities NCCD has become familiar with the functioning of the juvenile justice system throughout the country.

The Council of Judges represents jurists throughout the United States. Members sit on the bench of federal, state and municipal courts. The Council serves in an advisory capacity to the National Council on Crime and Delinquency. Due to its nationwide membership, the Council of Judges is aware of the potential implications of court decisions on the operation of the juvenile and criminal justice systems in many states.

NCCD and the Council of Judges are vitally concerned with improving the administration of justice. They are particularly concerned with retaining the rehabilitative goals of the juvenile court. The case before this Court raises issues central to the overall functioning of our juvenile justice system. The impact will vary significantly from state to state. Since NCCD and the Council of Judges are able to provide a broader perspective than are the other litigants on the likely total impact of the decision, we present this brief.

The parties have consented to the filing of an *amici curiae* brief by the Council of Judges and NCCD. Copies of their letters of consent have been forwarded to the Clerk.

ARGUMENT

I. Introduction

This brief focuses solely on the implications of this case for the proper functioning of the juvenile justice system. The *amici curiae* believe that as a matter of constitutional law the double

jeopardy clause clearly applies in the instant situation, since the proceeding arises after prosecution in an adult court. We support the legal arguments in respondent's brief and argue for affirmation of the lower court decision.

This Court has indicated that it will take into account the likely impact extension of a specific right to minors would have on the functioning of the juvenile court system in deciding whether to apply specific constitutional safeguards to juvenile court proceedings. *McKeiver v. Pennsylvania,* 403 U.S. 528, 547, 550 (1971). This brief discusses the reasons why affirmance of the lower court decision is necessary in order to protect the independence, integrity, and rehabilitative goals of juvenile courts.

II. Holding Transfer Hearings Prior to Adjudicatory Hearings Best Serves the Rehabilitative Goals of the Juvenile Justice System.

The National Council on Crime and Delinquency and its advisory committee, the Council of Judges, have long supported the proposition that once an adjudicatory hearing begins in juvenile court the minor is in fact in jeopardy, and to transfer him to criminal court for another trial on the facts alleged in the juvenile court petition would constitute a deprivation of due process of law.[1] See *Model Rules for Juvenile Courts,* Rule 9, and Comment (Council of Judges of the National Council on Crime and Delinquency, 1969); Standard Juvenile Court Act §13 (6th Ed. 1959) prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency, in cooperation with the National Council of Juvenile Court Judges and the U.S. Children's Bureau.

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1. We agree with petitioner that a hearing to determine whether there is probable cause to believe that the minor committed the offense in question would not place the minor in jeopardy. Petitioner's Opening Brief, p. 37.

Petitioner is incorrect in stating that the Standard Juvenile Act is silent on the issue of double jeopardy. Section 13 of the Standard Juvenile Court Act is as follows:

TRANSFER TO OTHER COURTS

> If the petition in the case of a child sixteen years of age or older is based on an act which would be a felony if committed by an adult, and if the court after full investigation and a hearing deems it contrary to the best interest of the child or the public to retain jurisdiction, it may in its discretion certify him to the criminal court having jurisdiction of such felonies committed by adults. No child under sixteen years of age at the time of commission of the act shall be so certified.
>
> When a petition has been filed bringing a child before the court under the provisions of subdivision 1 or 2 of Section 8 of this Act and the child resides outside the court district but in the state, the court may, in its discretion, transfer the case to the court having jurisdiction in the district where the child resides; or in such case the court may, after a finding on the allegations in the petition, certify the case for disposition to the court where the child resides. Thereupon, the court receiving such transfer shall dispose of the case as if the petition were originally filed or the finding were originally made there. Whenever a case is so certified, the certifying court shall forward to the receiving court certified copies of all pertinent legal and social records.
>
> When a petition has been filed a child shall not thereafter be subject to a criminal prosecution based on the facts giving rise to the petition, except as provided in this section.

This Section was intended to bar later prosecutions after an adjudicatory hearing had begun, and this is clearly

the import of the language.[2]

Contrary to the speculation by the petitioner, the recommended standards do not just reflect cautious draftsmanship to avoid potential double jeopardy problems. Cf. Petitioner's Opening Brief, pp. 49-50. Rather, they reflect the judgment of the Council of Judges and the NCCD that the rehabilitative purposes of the juvenile court system are best served by holding transfer proceedings prior to, rather than after, adjudicatory hearings.

Holding transfer hearings after adjudicatory hearings diminishes the possibility of rehabilitation both by discouraging the minor's cooperation with the juvenile court and by delaying the establishment of a treatment plan. It is a central goal of the Juvenile Court system to attempt to deal with a minor informally, without the negative aspects of the criminal justice system. Minors are encouraged to cooperate fully by the promise that the system is concerned solely with their best interest. In fact, counsel for a minor, recognizing the potential benefits to the minor of cooperation, may well take a leading role in encouraging cooperation, explaining the various rehabilitative programs to the minor and assuring that an appropriate disposition in fact occurs. See Kay and Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 Geo. L. Rev. 1401, 1409-20 (1974).

However, if the minor and his counsel believe that the minor may be subjected to a transfer proceeding after an adjudicatory hearing any cooperation will cease. The minor will rightly view the process as potentially hostile and respond accordingly. Counsel would be derelict to suggest cooperation,

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2. This position is similar to that adopted by other organizations concerned with juvenile courts. For example, the Children's Bureau of the United States Department of Health, Education and Welfare takes the position that the double jeopardy clause applies to juvenile court proceedings. W. Sheridan, *Legislative Guide for Drafting Family and Juvenile Court Acts*, U.S. Department of Health, Education and Welfare, Publication #472-69. §27 and Comment (1969).

since he cannot guarantee that his client will receive the benefit of juvenile court treatment.[3] Thus, adversary proceedings become necessary in many more cases than if the transfer hearing is held first. The goal of having speedy and informal hearings is jeopardized. See *In re Winship*, 397 U.S. 358, 375 (1970) (concurring opinion of Mr. Justice Harlan); *McKeiver v. Pennsylvania, supra*, 403 U.S. at 550. Significantly, this delay may occur even in cases where transfer procedures are not ultimately instituted, since counsel cannot be certain that transfer will not be requested.

Moreover, during the time that the minor is awaiting trial he may develop a negative attitude toward the juvenile court, thereby diminishing the prospects of effective rehabilitation. On the other hand, if the transfer hearing is held first, the minor can then be told that the court's primary interest is in seeing whether a rehabilitation plan can be developed. Counsel can confidently advise the minor to cooperate with the process, recognizing that his cooperation can only benefit, not harm, him. If the minor is found fit, he will often admit the charges and the chances for rehabilitation will be considerably enhanced.

Holding the transfer hearing after the adjudicatory hearing also delays substantially the establishment of a rehabilitation program for the minor in those cases where the minor is found fit for juvenile treatment. When the adjudicatory hearing is held first, counsel must initially prepare for the trial on the merits. This may require four or more weeks, especially if the charges

3. In fact, counsel would generally advise total silence, since any statements or admissions made by the minor might be used against him in an adult trial. The California Supreme Court tried to minimize this problem by ruling that statements made in juvenile court are inadmissible, *Bryan v. Superior Court of the County of Los Angeles*, 7 Cal.3d 575, 586-7, 102 Cal.Rptr. 831, 498 P.2d 1079 (1972), but this is not adequate protection, since the statements can lead to other evidence which won't be clearly inadmissible, or which may give the prosecutor tactical advantages in the adult proceedings.

are serious. If the minor is found guilty, counsel then needs additional time to prepare for the transfer hearing. Given the importance of this hearing, see *Kent v. United States*, 383 U.S. 541 (1966), several more weeks are usually needed.

All during this time the minor probably will be incarcerated. Unfortunately most juvenile detention homes are basically holding facilities without any treatment program. See Rosenheim, *Detention Facilities and Temporary Shelters* in Child Caring (ed. Pappenfort, Kilpatrick, Roberts, 1973), pp. 259-265; *Children in Custody, A Report on the Juvenile Detention and Correctional Facility Census of 1971*, U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, esp. pp. 13-16; Reuterman, Hughes & Love, *Juvenile Detention Facilities: Summary Report of a National Survey*, 9 Criminology 3 (1971). Many minors are kept in jails during this period of time. It has been increasingly recognized that early identification and treatment of the problems leading juveniles to commit crimes is essential to successful rehabilitation. See Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 Crime and Delinquency 180, 182 (1971). In addition, the uncertainty over the ultimate disposition creates anxiety in the minor and contributes to his negative attitude towards the juvenile process. See Snyder, *supra* at 184.

For these reasons *amici curiae* believe that applying the double jeopardy clause to bar any subsequent proceedings after a juvenile court adjudication hearing is totally consistent with the purposes underlying the juvenile court approach, i.e., protection and rehabilitation of the minor, and in fact, its application will facilitate the attainment of these goals.

III. Application of the Double Jeopardy Clause to Juvenile Proceedings is Necessary to Protect the Integrity of the Juvenile Court.

In addition to facilitating the rehabilitative goals of the juvenile justice system, application of the double jeopardy clause

to juvenile court hearings is necessary in order to protect the integrity of the juvenile court process itself. Unless double jeopardy applies, the juvenile court process is subject to the possibility of significant misuse by prosecuting authorities.[4]

The problem is most acute in states which, unlike California, permit a prosecutor to file proceedings against a minor in adult court even though the juvenile court has elected to retain jurisdiction. See, e.g., Florida Stat. Ann. §39.02(6). The problem is illustrated by a recent case from Florida, *R.E.F. v. State.* In that case the juvenile court held an adjudicatory hearing and decided

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4. It is possible that the double jeopardy clause could be applied differently depending on the context in which the case arises. Prior jeopardy may be in issue in six different situations:

(a) The minor has been acquitted after an adjudicatory hearing in juvenile court and is being retried in juvenile court for the same offense.

(b) The minor has been acquitted after an adjudicatory hearing in juvenile court and is being retried in adult court for the same offense.

(c) The minor has been convicted in juvenile court, found fit, and is awaiting disposition when adult charges are brought by a prosecutor.

(d) The minor has been convicted in juvenile court, found fit, and a dispositional program has commenced when adult charges are brought by a prosecutor.

(e) The minor has been convicted in juvenile court, found fit, placed in a juvenile correction facility, and is then returned to juvenile court by the institution as unamenable to the treatment of the institution, and the minor is then transferred to adult court for prosecution.

(f) The minor has been convicted in juvenile court, and the juvenile court at a transfer hearing held prior to any disposition finds the minor unfit.

This last situation is the only one before this Court. However, *amici curiae* believe that the policy considerations which dictate application of the double jeopardy clause in situations (a) through (e) should also be considered in deciding the present case. Application of the double jeopardy clause will aid the goals of the juvenile court in all six situations. Developing separate doctrines for each situation would be cumbersome, confusing and unnecessary.

to retain jurisdiction over the minor. The minor was sent to a juvenile treatment institution. However, the prosecuting attorney then brought criminal proceedings in adult court, and the Florida Supreme Court ruled that these proceedings were not barred by the double jeopardy clause. *State v. R.E.F.,* 251 So.2d 672 (Fla.App. 1971), *aff'd sub nom. R.E.F. v. State,* 265 So.2d 701 (1972), habeas granted, *Fain v. Duff,* 364 F.Supp. 1192 (M.D. Fla. 1973), *aff'd* 488 F.2d 218 (5th Cir. 1973) (en banc), petition for cert. filed 42 U.S.L.W. 3667 (U.S. June 4, 1974) (No. 73-1768).

As *Fain* illustrates, unless the double jeopardy clause is applied to prevent a criminal trial after an adjudication in juvenile court, the juvenile court cannot function as an independent body serving the rehabilitative needs of the minor. The prosecutor is able to undermine the juvenile court judge's authority to determine the appropriate dispositional action. The expertise of the juvenile court judge in deciding whether a minor needs and can benefit from treatment can be ignored by a prosecutor who may be responding primarily to public pressure.[5] Cf. *United States v. Candelaria,* 131 F.Supp. 797 (1955).

The ability of a prosecutor to file charges in adult court substantially hinders the effective implementation of a treatment plan. If adult charges are pending, or if there is a possibility that adult charges will be filed, a juvenile court judge may delay sending a minor to a treatment program until the adult charges are settled. As previously discussed, such delay can greatly decrease the potential success of the treatment program.

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5. It should also be recognized that, at least theoretically, the prosecutor could file charges in adult court even after an acquittal in juvenile court. *Amici curiae* believe that an acquittal following a full juvenile court hearing fully protects the public, and any further proceedings would undermine the status of the juvenile court. Moreover, it would be manifestly unfair to give the state a second chance in an adult proceeding to convict a youngster found not guilty in juvenile court. See *Richard M. v. Superior Court,* 4 Cal.3d 370, 93 Cal.Rptr. 752, 482 P.2d 464 (1971).

The possibility of adult charges being filed may be deleterious even when the minor is sent to a treatment institution. Faced with the uncertainty over his status, the minor may be unable or unwilling to participate wholeheartedly in the treatment program. We certainly cannot expect a minor in such a situation to have the positive attitude needed for successful treatment. In addition, the minor's confidence in the fairness and integrity of the entire justice system will be impaired if he has cooperated with the juvenile court and then winds up facing a criminal trial.

Even in states like California, where the prosecutor cannot independently bring an adult court action, it is possible for the district attorney to misuse the juvenile court processes. A district attorney can press for a full jurisdictional hearing in juvenile court in order to discover the minor's defense and then press the juvenile court to find the minor unfit. Although this may not have occurred in the case before this Court, the Council of Judges is concerned over such potential abuses. Since application of the double jeopardy clause would prevent such problems, it is in the interest of the juvenile justice system that the protection be extended.

IV. Fundamental Fairness to Minors Requires Application of the Double Jeopardy Clause.

The judges who authored the Model Rules and the judges and others who authored the Standard Juvenile Court Act believe that it is essential to have minors feel that they are treated fairly if the rehabilitative goals of the system are to be achieved. Therefore, they strongly support extension of due process protections to juvenile court proceedings in a manner consistent with the goals of the juvenile court system.

Juvenile court proceedings involve the potential loss of liberty for the minor. *In re Gault*, 387 U.S. 1 (1967). Preventing double punishment for the same offense is one of the basic concerns underlying the double jeopardy clause. See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 266 N.13 (1961); *Ex Parte Lange*, 85 U.S. (18 Wall) 163, 173 (1873). To allow juveniles to be retried after a juvenile proceeding would clearly subject them to the possibility of double punishment.[6]

In addition, the double jeopardy clause protects persons from going through the hardship and trauma of two trials, regardless of whether they were acquitted or convicted in the first trial. While every effort may be made to keep juvenile proceedings as informal and non-punitive as possible, it is still true that going through a juvenile court proceeding is a traumatic experience for a minor. It is the position of the Council of Judges that once a juvenile has undergone this experience, it is contrary to his interest to be forced to face another trial.

Finally, it is unfair to place a minor in a position where by defending himself in juvenile court he may be making it easier for a prosecutor to obtain a conviction in adult court. This will necessarily occur if the adjudicatory hearing is held first. Especially in light of the positive reasons for holding transfer hearings first, it is essential that any appearance of unfairness be eliminated by applying the double jeopardy clause to juvenile court proceedings.

V. Application of the Double Jeopardy Clause to Juvenile Proceedings Will Not Create Additional Burdens on the Juvenile Justice System.

From the perspective of sound judicial administration, it is quite feasible to hold transfer hearings prior to adjudicatory

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6. As previously indicated, juveniles may be subjected to double punishment when a prosecutor files adult charges after the minor has been sentenced, or given a disposition, in juvenile court. In addition, California and several other states allow transfer to adult court for prosecution if a juvenile institution will not keep the minor. *California Welfare and Institutions Code* §§707, 780 (West 1972).

hearings. Such a procedure is required in 15 states, see Petitioner's Opening Brief, pp. 47-8, and was recommended as the preferable procedure by the California Supreme Court. See *Donald L. v. The Superior Court of Los Angeles County*, 7 Cal. 3d 592, 102 Cal.Rptr. 850, 498 P.2d 1098 (1972).

Petitioner has suggested that if transfer hearings must be held prior to the adjudicatory hearing, this will create a substantial burden on the juvenile court. Petitioner's Opening Brief, pp. 38-41. However, petitioner's arguments appear to be based on incorrect assumptions about the manner in which juvenile courts operate. Because these assumptions are critical to petitioner's argument, it is necessary to describe in some detail how the process actually works in California and in most jurisdictions.

Petitioner assumes that "[i]f transfer is barred as a dispositional alternative to probation or placement in a juvenile facility, states such as California must adopt a preliminary hearing procedure in all juvenile court cases. . . ." Petitioner's Opening Brief, p. 38. This is simply incorrect. First of all, fitness hearings will not have to be held in every case brought to juvenile court. Virtually every state statute substantially limits the type of cases in which transfer is authorized – by restricting the type of offenses for which transfer is possible and/or by allowing transfer only if the minor is over a certain age. See Rudstein, *Double Jeopardy in Juvenile Proceedings*, 15 Wm. and Mary L. Rev. 266, 297-8 (1972). For example, in California only minors who were 16 or 17 years old at the time of the offense may be transferred. *California Welfare and Institutions Code* §707. Thus, one cannot use the total number of cases heard by the juvenile court as a basis for estimating the potential number of transfer hearings. Cf. Petitioner's Opening Brief, p. 41.

Moreover, transfer is not a realistic alternative in the overwhelming majority of cases in which the minor is eligible for transfer, and no special hearing is necessary to establish that fact. Under most statutes transfer is appropriate only when the minor

has committed a serious offense or has an extensive history of delinquent behavior which indicates he may be unamenable to treatment in the juvenile system. See Rudstein, *supra*, 14 Wm. and Mary L. Rev. at 299. The available evidence indicates that only a small number of cases fall in this category.[7]

Furthermore, the cases where transfer is likely are invariably identified very early in the juvenile court process. See *State v. Halverson*, 192 N.W.2d 765, 769 (Iowa 1971). In California, as in most states, the juvenile probation department begins consideration of dispositional alternatives as soon as charges are filed in juvenile court. See H. Thompson, *California Juvenile Court Deskbook*, California Council of Trial Judges (1972), §10.2, p. 146. In most cases it is clear that the minor is amenable to juvenile court treatment, and the possibility of a fitness hearing is not considered. No transfer hearing is needed in these cases. If it appears to the probation officer that fitness may be in issue, it is the general practice throughout California to indicate this to the juvenile court judge *prior to the adjudicatory hearing.*[8]

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7. See Hays and Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 Houston L. Rev. 709, 710 (1972) (reporting that the Houston, Texas juvenile court considered the waiver of 18 juveniles over a six-month period. Distributed among those 18 were 21 charges: 10 of murder and assault to murder, 3 of rape, and 8 of robbery by firearms); Note, *Problem of Age and Jurisdiction in the Juvenile Court*, 19 Vand. L.Rev. 833, 854 (1966) (reporting on a Nashville study where every juvenile remanded to criminal court over a 17-month period had appeared in juvenile court at least once before; 43 of 49 had previously been committed).

8. Although there is no published study of the procedures generally followed in juvenile courts in California, Professor Michael Wald, counsel for *amici curiae*, has recently completed an extensive analysis of the procedures in two large California counties, Alameda and Santa Clara. All of the cases transferred from juvenile court to adult court during 1971 and 1972 in these two counties were examined. Computer printout, available at Stanford Law School, shows that the transfer hearings were held prior to the adjudicatory hearing in 220 of the 239 cases in which a transfer occurred. See also Thompson, *supra*, *California Juvenile Court Deskbook* §10.3, pp. 146-8.

Only in these cases need a transfer hearing be held,[9] and transfer hearings would be necessary in these cases *even if the adjudicatory hearing were held first.*[10] Thus, there is no reason to expect an increased number of hearings if transfer hearings are held first.

In fact, it is quite possible that fewer hearings will be necessary. As previously discussed, if the transfer hearing is held first and the minor is found fit, he may then admit jurisdiction, thus obviating the need for an adjudicatory hearing. In addition, the dispositional issues will have been discussed at the transfer hearing, so only a brief dispositional hearing would be necessary. If the minor is found to be unfit, the need for an adjudicatory hearing would be eliminated.

It is true that in jurisdictions which have only one juvenile court judge and where the same judge cannot conduct both a transfer hearing and an adjudicatory hearing there may be administrative difficulties in having the transfer hearing first. However, the use of visiting judges or the temporary elevation of a municipal court judge to serve as a superior court judge – if, as in California, only superior court judges can hear juvenile court cases – should be adequate to meet the problem. *Amici curiae* believe that any burdens in this regard are more than compensated for by the likelihood of fewer contested jurisdictional hearings and the increased prospects for rehabilitation achieved by holding transfer hearings first.

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9. Since minors who are transferred generally have extensive delinquent histories, they will already have had social studies about them conducted. Thus, they will have already suffered any stigmatization which such a study would entail. A minor who does not want the study conducted can waive his right to having the transfer hearing conducted prior to the adjudicatory hearing.

10. This, of course, would not be true in those few cases where the minor is found not guilty.

CONCLUSION

In *McKeiver v. Pennsylvania, supra,* this Court refused to extend the right to jury trials to juvenile court hearings. The presence of juries, said the Court, would increase the criminal aspects of the juvenile hearing and thereby undermine the distinctive nature of the juvenile process. Further, jury trials were not thought to be essential to assure a fair fact finding process. Unlike the situation in *McKeiver,* there is no compelling reason to deny juveniles the protection against being placed twice in jeopardy. On the contrary, application of the double jeopardy clause prevents the juvenile hearing from becoming more criminal in nature. Its application will facilitate the rehabilitative goals and the proper functioning of the juvenile court system. Therefore, we urge this court to affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Gilman, Counsel for Amicus, hereby certify that on or before January 12, 1975, three (3) copies of this brief were duly served upon attorneys for both parties by mail service postage prepaid.

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APPENDIX A

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